THE

LAW QUARTERLY REVIEW.

No. VI. April, 1886.

AN EXPERIMENT IN CODIFICATION[1].

THE Bills of Exchange Act 1882 is, I believe, the first code or codifying enactment which has found its way into the English Statute Book. By a code, I mean a statement under the authority of the legislature, and on a systematic plan, of the whole of the general principles applicable to any given branch of the law. A code differs from a digest inasmuch as its language is the language of the legislature, and therefore authoritative; while the propositions of a digest merely express what is, in the opinion of an individual author, the law on any given subject. In other words the propositions of a code are law, while the propositions of a digest may or may not be law. A code, on the other hand, differs from a consolidation Act inasmuch as it embodies the common law of the subject it deals with, while a consolidation Act merely gathers together and harmonizes the various statutory enactments relating to some particular matter. As a code is a novelty in English law, it may be of interest to the readers of this REVIEW to learn under what conditions the experiment was successfully carried out, and to consider how far it can or ought to be repeated as regards other portions of the Law. Of late years several attempts at codification have been made, but from various causes they have proved unsuccessful. Mr. Justice Stephen led the way, and produced his Criminal Code Bill. The Bill was introduced by the Government of the day, and then referred to a strong Royal Commission of eminent judges—Lord Blackburn, Lord Justice Lush, Mr. Justice Barry and Sir Fitz-James Stephen himself. After careful revision by the Commission, the Bill was reintroduced, and great hopes were entertained that

[1] The first portion of this paper has been re-written from an address given by me to the Birmingham Law Students Society in 1885.

it might pass into law; but it was wrecked in an Irish storm in the Grand Committee of the Commons. The Partnership Bill, most carefully drafted by Mr. Frederick Pollock, then followed. It codified the law of partnership, but it also proposed to effect some considerable changes in the existing law. Unfortunately it encountered the adverse trade wind of hostile mercantile opinion, and can hardly be said to have left its port of departure. The Bills of Exchange Bill which I drafted was the next venture in codification. It was lucky enough to secure Sir Farrer Herschell (the present Lord Chancellor) for its pilot. He safely steered it through all the shoals and quicksands of the House of Commons; Lord Bramwell took charge of it in the Lords, and it became law. I may perhaps give my opinion how and why that Bill was more fortunate than others which have deserved better. Its success depended on the wise lines laid down by Sir Farrer Herschell. He insisted that the Bill should be introduced in a form which did nothing more than codify the existing law, and that all amendments should be left to Parliament. A Bill which merely improves the form, without altering the substance, of the law creates no opposition, and gives very little room for controversy. Of course codification pure and simple is an impossibility. The draftsman comes across doubtful points of law which he must decide one way or the other. Again, voluminous though our case law is, there are occasional gaps which a codifying Bill must bridge over if it aims at anything like completeness. Still in drafting the Bills of Exchange Bill, my aim was to reproduce as exactly as possible the existing law, whether it seemed good, bad, or indifferent in its effects. The idea of codifying the law of negotiable instruments was first suggested to me by Sir Fitz-James Stephen's digest of the Law of Evidence, and Mr. Pollock's Digest of the Law of Partnership. Bills, notes, and cheques seemed to form a well isolated subject, and I therefore set to work to prepare a Digest of the law relating to them. I found that the law was contained in some 2,500 cases, and 17 statutory enactments. I read through the whole of the decisions, beginning with the first reported case in 1603. But the cases on the subject were comparatively few and unimportant until the time of Lord Mansfield. The general principles of the law were then settled, and subsequent decisions, though very numerous, have been for the most part illustrations of, or deductions from, the general propositions then laid down. On some points there was a curious dearth of authority. As regards such points, I had recourse to American decisions, and to inquiry as to the usages among Bankers and Merchants. As the result, a good many propositions in the digest, even on points

of frequent occurrence, had to be stated with a (probably) or a (perhaps). Some two years after the publication of my digest, I read a paper on the question of codifying the law of negotiable instruments before the Institute of Bankers. Mr. John Hollams, the eminent commercial lawyer, who was present, pointed out the advantages of a code to the mercantile community; and, mainly I think on his advice, I received instructions from the Institute of Bankers and the Associated Chambers of Commerce to prepare a Bill on the subject. The draft of the Bill was first submitted to a sub-committee of the Council of the Institute of Bankers, who carefully tested such portions of it as dealt with matters of usage uncovered by authority[1]. The Bill was then introduced by Sir John Lubbock, the President of the Institute. After it had been read a second time in the Commons, it was referred to a strong Select Committee of merchants, bankers, and lawyers, with Sir Farrer Herschell as chairman[2]. As the Scotch law of negotiable instruments differed in certain particulars from English law, the Bill was originally drafted to apply to England and Ireland only. The first work of the Select Committee was to take the evidence of Sheriff Dove-Wilson of Aberdeen, a well known authority on Scotch Commercial Law. He pointed out the particulars in which the Bill, if applied to Scotland, would alter the law there. With three exceptions the points of difference were insignificant. The Committee thereupon resolved to apply the Bill to Scotland, and Sheriff Dove-Wilson undertook the drafting of the necessary amendments. Eventually the Scotch rules were in three cases preserved as to Scotland, while on the other points the Scotch rule was either adopted for England, or the English rule applied to Scotland. The course adopted by the Committee was this. They first went through the Bill informally. When any amendment seemed expedient, the opinion of the Committee was taken upon it. If the Committee were unanimous in its favour, the amendment was directed to be inserted. If there was any opposition, the amendment was not pressed. This plan greatly facilitated the passing of the Bill, because when it came to be reported to the House, all amendments came backed with the unanimous recommendation of the Select Committee. As draftsman I was present at the sittings of the Committee to answer questions and give explanations as required. When the Bill had been gone through informally, the agreed amendments were put into my

[1] Mr. Billinghurst, of the London and Westminster Bank, and Mr. Slater, of the London and County Bank, undertook the brunt of the work.

[2] The Committee included Sir Farrer Herschell, Q.C.; Sir John Lubbock; Mr. Asher, Q.C.; Mr. Cohen, Q.C.; Mr. Reid, Q.C.; Mr. Whitley, Mr. T. C. Baring, Mr. R. B. Martin, Mr. Orr Ewing, Mr. Jackson, and Sir Charles Mills.

hands to draft. The advantages of this course are obvious. The whole of the amendments were drafted at once (with, of course, the exception of those drafted by Sheriff Dove-Wilson) and by the same hand. This secures uniformity of language, and gives ample time for deliberation. As it is, however, I am aware of two or three slips, and there are doubtless others which I have not found out. After I had drafted the amendments, the Committee went through the Bill formally, clause by clause, and inserted the amendments in their appropriate places. If the Committee had in the first instance gone through the Bill formally, it being impossible to go back when once a clause or part of a clause has been passed, numerous amendments would have been put in in a hurry, or dovetailed into wrong places, as is so often done in Committee of the whole House. Sir Farrer Herschell reported the Bill to the House, and it was read a third time and sent up to the Lords without alteration. In the House of Lords it was again referred to a Select Committee with Lord Bramwell for Chairman[1]. A few amendments were there inserted mainly at Lord Bramwell's suggestion. These were agreed to by the Commons, and the Bill passed without any kind of opposition. The Act has now been in operation for more than three years, so that some estimate can be formed as to its results. Merchants and bankers say that it is a great convenience to them to have the whole of the general principles of the law of bills, notes, and cheques contained in a single Act of 100 sections. As regards particular cases which arise, it is very seldom necessary to go beyond the Act itself. It surely must be a great advantage to foreigners who have English bill transactions to have an authoritative statement of the English law on the subject in an accessible form. If I could do the work over again, I certainly could do it better and should profit by past experience. But as it is, the Act has given rise to little or no litigation. Its construction has twice been adverted to in reported cases, and there is one direct decision upon it, but in that case it was admitted that the Act correctly reproduced the common law. I am sure that further codifying measures can be got through Parliament, if those in charge of them will not attempt too much, but will be content to follow the lines laid down by Sir Farrer Herschell. Let a codifying Bill in the first instance simply reproduce the existing law, however defective. If the defects are patent and glaring it will be easy to get them amended. If an amendment be opposed, it can be dropped without sacrificing the Bill. The form of the law at any rate is improved, and its

[1] The Committee included the Lord Chancellor (Selborne), Lord Bramwell, Lord Fitzgerald, Lord Balfour of Burleigh, and Lord Wolverton.

substance can always be amended by subsequent legislation. If a Bill when introduced proposes to effect changes in the law, every clause is looked at askance, and it is sure to encounter opposition.

Assuming then the possibility of further codification, the question arises whether its extension is expedient. All the continental nations have codified their laws, and none of them shew any signs of repenting it. On the contrary most of them are now engaged in remodelling and amplifying their existing codes. In India a good deal of codification has been carried, and public and professional opinion seems almost unanimous in its favour. In England the most distinguished lawyers and judges have pronounced in favour of codification as appears by the Reports of the Digest of Law, Judicature, and Criminal Code Commissions. Any extension of codification here would merely produce a slight flutter in the legal dove-cote. All that is required is a sufficiently strong public opinion in its favour to overcome the Parliamentary *vis inertiæ*. In the United States, however, Mr. Dudley Field's proposed Civil Code for the State of New York has raised a tempest of legal objections against codification in general, and the draft code in particular. The Bar Association of New York have denounced the scheme, and a perfect hailstorm of pamphlets and protests has beaten down upon it. I am not sufficiently acquainted with Mr. Field's work to pretend either to condemn or defend it on its merits. But I propose to examine shortly some of the American arguments against codification, using the Bills of Exchange Act in a slight degree to test their validity.

The main Transatlantic argument against codification appears to be that case law is natural, while codified law is artificial[1]. I am not sure that the terms 'natural' and 'artificial' have any definite meaning when applied to positive law. If they have, it seems to me that one might as well argue for the superiority of natural clothes and natural dwellings over the garments and houses of civilized life. In so far as case law is anything more than the application of a well ascertained principle to a particular instance it is *ex post facto* legislation of the worst kind. The judges, in giving their reasons, must of necessity generalise. In doing so they must either generalise from the insufficient data of the particular case before them, or they must follow some imperfect or strained analogy furnished by previous authority. In the latter event they are usually repeating the old experiment of putting new wine into old bottles—with the old result. The American objection in effect

[1] The title of Mr. T. Bleecker Miller's able pamphlet is 'The Destruction of our Natural Law by Codification.' Several other writers, including the Committee of the Bar Association, urge the same objection.

amounts to this, that codification deprives the common law of its normal 'flexibility' or 'elasticity[1].' This argument was carefully considered by the Royal Commission on the Criminal Code Bill. The Commission was composed entirely of judges of eminence, who certainly would have no personal bias against judge-made law. In their Report they say, 'The manner in which the law is at present adapted to circumstances is first by legislation, and secondly, by judicial decisions. Future legislation would of course be in no way hampered by codification. It would on the other hand be much facilitated by it. The objection under consideration applies therefore to the effects of codification on the course of judicial decisions. Those who consider that codification will deprive the common law of its elasticity, appear to think that it will hamper the judges in the exercise of a discretion, which they are at present supposed to possess, in the decision of new cases as they arise. In order to appreciate this objection it is necessary to consider the value of this so-called discretion which is attributed to the judges. It seems to be assumed that when a judge is called upon to deal with a new combination of circumstances, he is at liberty to decide according to his own views of justice and expediency; whereas, on the contrary, he is bound to decide in accordance with principles already established which he can neither disregard nor alter. The consequences of this are, first, that the elasticity of the common law is much smaller than it is often supposed to be; and secondly, that so far as a code represents the effect of the decided cases and established principles, it takes from the judges nothing which they possess at present. In fact the elasticity so often spoken of as a valuable quality would, if it existed, be only another name for uncertainty. The truth is the expression "elasticity" is altogether misused when applied to English law. The great characteristic of the law of this country is that it is extremely detailed and explicit, and leaves hardly any discretion to the judges.' It follows therefore that at any rate the greater part of English law is ripe for codification. Decided cases furnish the raw material for a code. The more plentiful the cases, the easier and more certain is the work of the codifier. It may perhaps be urged that when principles are well settled, codification is a work of supererogation. But a moment's reflection disposes of this argument. A principle may be well settled but yet not easily accessible. Moreover when cases are numerous they are not always strictly consistent, at any rate as regards dicta. Reporters and judges are not infallible, and we find in the reports that fairly well-established principles are often

[1] See Mr. John R. Strong's learned pamphlet entitled 'Remarks upon the Codification Controversy.'

re-canvassed on account of some incautious dicta, or through some ruling on a case where the facts were very exceptional. Under the common law, when a point of law arises two processes have to be gone through before the true rule applicable to the facts can be ascertained. The first is an inductive process. All the authorities have to be examined for the purpose of discovering the general principle which they affirm. Then comes the deductive process. The applicability of the principle so ascertained to the particular facts has to be established. In the former of these two processes there is especial liability to error. But under a code the inductive process is dispensed with. The general principle is laid down in the authoritative language of the legislature. The easier process alone has to be resorted to. I cannot help thinking that lawyers sometimes do not quite like their mysteries being divulged. Inasmuch as codification renders the general principles of the law easily accessible and capable of being 'understanded of the common people,' they regard it with a certain amount of jealousy and distrust. But the maxim 'Ignorantia juris neminem excusat' binds laymen as well as lawyers. It is therefore only right that law should, as far as possible, be made accessible and intelligible to the lay as well as to the legal mind. I have heard it said that the whole commands of the common law may be summed up in the line of a once popular song which bids one 'love your neighbour as yourself, and paddle your own canoe.' To do to others as one would be done by, and to mind one's own business is doubtless a good practical precept for avoiding litigation. But the exigencies and complications of modern life require from most men a somewhat more detailed knowledge of the laws which govern them.

Another argument urged in New York against codification is that it would tend to promote rather than to diminish litigation[1], and several writers rely upon the opinion of a learned judge who said, 'I have never yet seen a code which did not raise more questions than it settled.' Of course no code can be perfect and exhaustive, but any carefully drafted code ought to settle many more questions than it raises. I am well aware that the Bills of Exchange Act might have been better drafted than it was. But it has been in force for some time without having called for legislative revision, or having given any trouble to the Courts in the way of interpretation. During the last year I have tried at least two cases a week arising on bills or notes, but I have never had occasion yet to construe any section of the Act. I cannot doubt that other and more experienced draftsmen could deal with other portions of the law in a yet more effective manner. Where a code is not honestly and laboriously

[1] See Mr. Albert Mathews, 'Thoughts on the Codification of the Common Law,' p. 19.

worked out, but is confined to meagre and jejune generalities, as is the case with some parts of the Code Napoleon, it must of course give rise to a large body of judicial decision before its meaning can be fixed and ascertained. To cite again the words of the Royal Commission already referred to:—'The great richness of the law of England in principles and rules embodied in judicial decisions involves as a consequence that a code adequately representing it must be elaborate and detailed.' The argument that codification unsettles rather than settles the law, is valid only against hasty and ill-considered codification. A good many of the criticisms on the proposed New York Code are to the effect that, while the code correctly reproduces some acknowledged general principle, it omits to reproduce the various qualifications and exceptions which have been engrafted on it. In so far as such omissions were unintentional they are merely signs of defective workmanship in this particular draft. They tend to shew that any extensive work of codification must be sub-divided among several individuals. If common law is to be correctly reproduced in a code, the draftsman must not content himself with second-hand acquaintance with the subject, but must carefully and exhaustively go through every available original authority: the voluminous nature of the common law renders it impossible for a single individual to deal effectively with more than some isolated branch of it. Any extensive scheme of codification should, it seems to me, be parcelled out among different workers acting under the supervision of some one draftsman or committee to secure uniformity of language. If and in so far as the Draft Code of New York by omissions or additions deliberately changes the existing law, I venture to think it has begun at the wrong end. A codifying Bill should in the first instance reproduce the existing law with all its defects and anomalies, assuming them to be clear law. If the Bill were to pass as it stood, the law would be no worse in substance while its form would be improved. But it would not so pass. The legislature would always assent to the removal of any manifest defect; and the mere statement of such defects and anomalies would be a strong argument in favour of passing the Bill for the purpose of bringing the law into a rational state. Any proposed amendments should of course be drafted before the Bill is introduced, and by the same person who drafted the Bill. They would then be ready to hand, cut and dried, should the opportunity arise for inserting them. In this way a great deal might be done towards keeping the language of a Code uniform and consistent. Judging by the experience of the Bills of Exchange Bill, the House of Commons is very reasonable in its treatment of a purely codifying Bill. If the Bill be properly vouched for as a

measure not organically altering the existing law the House is quite content to leave it alone. But any change in the existing law requires to be strictly justified. In law matters *primâ facie* 'whatever is, is right.' When a Bill is introduced which professes to alter the law, it comes at once into the category of opposed measures. Every member considers himself justified in expressing an opinion, and as far as he can in giving effect to his opinion on each and all of its provisions. The result is that the measure is so hacked and hewed at by ill-advised and hasty amendments that it emerges from Committee wholly disfigured. Mr. Frederic Harrison has graphically described the process an ordinary opposed Bill goes through. He says, 'A Bill usually goes into Parliament in the state in which it ought to come out, and comes out in the state in which it ought to go in. An ordinary statute differs from an ordinary deed, much as a marriage settlement prepared by a competent lawyer differs from one which should be finally settled in a dozen fierce wrangles between the heated relatives of the happy pair. If testators when making their wills were to put in new clauses on the spur of the moment, or the respective families were to cut about the drafts of an eminent conveyancer, wills and settlements would have a strong resemblance to modern Acts of Parliament.' Any codifying enactment subjected to this process would of course be infinitely worse than useless. Theoretically, no doubt, a codifying measure should be introduced in the form in which it ought finally to emerge as a statute. In autocratically governed countries this is possible; but in England or the United States such a procedure is impracticable. The method I have suggested, though less ambitious, has the advantage of being feasible. Subjects ripe for codification should be chosen, and the codifying Bill should always be preceded by a careful digest. If the digest be prepared by a practical lawyer, who has ordinary drafting skill, the drafting of the Bill will involve but little additional labour or time. This method of course entails expense; but the evolution of common law is not cheap. Assume, and the estimate is a very moderate one, that each case which is sufficiently fought out to find its way into the reports, costs the litigants £100. The law of Bills of Exchange was contained in 2,500 cases. It follows therefore that its elaboration directly cost the community £250,000; but the indirect cost of uncertainty in the law is probably much greater than the direct cost.

As regards the criticisms on the drafting of the New York Code I have nothing to say. The drafting of a code should be governed by the same rules as apply to an ordinary Act. Where a word or expression has the same meaning in ordinary and in legal phraseology, it is a mistake to attempt to define it. If there be a technical

expression and a popular expression having precisely the same meaning, it is better to employ the popular expression; but it is wrong to substitute a loose popular term for a technical term with a precise and well defined meaning, when the substitution may give rise to doubts as to interpretation. So too, when the same thing is meant, the same expression should always be repeated instead of a paraphrase, for clearness of meaning is much more important in a statute than elegance of diction. Looking back on the arguments of our legal brethren in New York as a whole it seems to me that, in so far as they are directed against codification generally, they are very inconclusive; in so far as they indicate that the work of codification should be carried out step by step, they are entitled to great weight; while in so far as they demonstrate the mischiefs arising from ill-considered or hasty schemes of codification they are absolutely conclusive.

M. D. CHALMERS.

[I feel bound to add that for my own part, so far as I have been able to form an opinion of the draft Civil Code for New York, it is a decidedly unfavourable one. I am disposed to agree with the Bar Association of New York in thinking the present state of the law better than that code, or anything much like it. But I do not agree that this proves codification to be in itself undesirable or impracticable.—ED.]

THE TWELVE TABLES OF GORTYN.

IN the summer of 1884 a discovery was made in Crete, which is of great importance for our knowledge both of early Doric Greek and of early law. A mill-stream at Hagioi Deka had been lately shut off, and in the bed appeared some blocks with an inscription. The occupier directed the attention of an Italian scholar—Dr. Federico Halbherr—to it, who in July laid bare and copied a part. At his request Dr. Ernst Fabricius completed the work by the beginning of November. They each compared their copy with the original before it was again covered up, and communicated their copies to one another. Dr. Halbherr's copy of the whole was edited by Professor D. Comparetti, of Florence, in the *Museo Italiano di Antichità Class.*, i. pp. 233 foll. (also published separately); and Dr. Fabricius published his copy in *Mittheil. d. deutschen archaeol. Instituts* at Athens, ix. pp. 363 foll. Dareste gave an account of it in *Bull. de Corresp. Hellen.*, 1885, pp. 301–317; and four editions have appeared in Germany in 1885, each with a translation and notes. Two, by H. Lewy and F. Bernhöft, are slighter productions; a third, by two Bonn Professors, F. Bücheler and E. Zitelmann, contains a scholarly edition of the text by the former and thorough discussion of the law by the latter; and the last, by Joh. and Theod. Baunack, has elaborate discussions of the language. Meister has made some suggestions in Bezzenberger's *Beiträge*, x. 139 foll. I am chiefly indebted to Comparetti's facsimile and the two last-named admirable editions. Fabricius and Dareste I have not seen.

The inscription is on blocks of grey limestone forming part of a wall, which was itself probably part of a circular inclosure of about thirty-three mètres in internal diameter. The inscription is in twelve columns, and is nearly nine mètres long and 1·72 mètres high. There is a base of 0·26 mètre high: on this stand four rows of carefully hewn blocks containing the inscription, and a blank row above. A projecting pilaster bounds it on the right of the spectator, and the last column has space unfilled. From these facts and an old numbering in the margin we may infer that we have the whole inscription, excepting, indeed, the top left corner of col. ix., nearly the whole top of col. x., and the whole top of col. xii. When the mill-stream was made, part of the top row of blocks was removed or broken. The tops of cols. viii. (part), ix., and xi. were found a few years ago, and their contents are given in Roehl's *Inscr. Graec. Antiquissimae.*

Hagioi Deka is near the ruins of Gortyn or Gortyna, a city mentioned by Homer, and, excepting Cnossus, at one time the most powerful town in Crete. As some other fragments of legal inscriptions have been found in the close neighbourhood of ours, it is conjectured that this was the site of the law-court, and that the laws lined the walls.

The inscription is very clearly written in letters of about an inch high, and only in a few places, where the blocks join, is it mutilated or illegible. But it is in a dialect little known from other writings or inscriptions, and is written with an alphabet of only eighteen letters. The digamma is one: separate signs for Z, H, Ξ, Φ, X, Ψ, Ω are wanting. It is written *βουστροφηδὸν* ('ox-turning-wise'), i.e. right to left and left to right alternately; of course, without intervals between the words and without any marks for breathing or accent. Hence in parts there is some doubt what are the words; many forms are new to grammar, and some words are new to the lexicon.

On consideration of the alphabet, of the syntactical character, and of the legal expression, the date of the law is placed by Bücheler and others between the Roman XII Tables and Plato's *Laws*, i.e. cir. 450 to 350 B.C. Zitelmann inclines to the earlier limit. Now the Roman code is hardly known to us at all in an authentic manner. A few barely intelligible fragments, variously expressed by writers from four to six centuries later, and a few traditional statements, are all our real knowledge. This Cretan inscription lifts us at once over centuries of tradition and careless copying to a first-hand knowledge of one of the earliest European codes. The Twelve Tables of Gortyn (as we may fitly call them) by their extent and character take the lead of all legal inscriptions, either of Greece or Italy; and I have therefore thought that an English translation would be of interest to the readers of this journal. A summary of the principal matters may be useful. The details are better left to the words of the law itself. Many questions will occur to the reader, for which no solution is at hand.

Three *classes of persons* are named in our law, freemen, clubless persons, and slaves. Their relative importance is roughly indicated by the scale of fines imposed for certain offences; e.g. a freeman has to pay one hundred staters, a clubless person ten staters, a slave half a stater; and, on the other hand, a slave committing the injury pays double the amount imposed on a freeman. Proportioned to the fine is the evidence required. A freeman clears himself from the charge of false accusation by his own oath and that of four compurgators: a clubless man requires two compurgators, a slave requires the oath of his lord and one other. In some cases freemen

only are competent witnesses. Clubless persons are perhaps freedmen or other unprivileged citizens. Slaves in Crete, according to Athenaeus (vi. p. 263), referring no doubt to earlier sources than his own time, were of two kinds, city slaves purchased for money, and country slaves, who were former inhabitants enslaved by war. The latter class correspond very well to those called in our inscription οικεες, which I have translated 'householders.' They—sometimes, at any rate—occupied separate houses, their marriages were recognized, they had their own goods, and in the last resort, in default of kin, they succeeded to the inheritance of their lord. Purchased slaves are also mentioned.

Three *distinctions of age* are recognized in males: ungrown, grown, and 'runners;' in females two only, ungrown and grown, with which terms 'unripe' and 'ripe' coincide, but relate specially to marriage. The age of puberty was clearly the division. Girls are deemed marriageable at twelve years old. A lad became a 'runner,' i. e. was admitted to the public athletic exercises, as we learn from other authorities, at seventeen years of age.

The code deals entirely with private law; and the family and family property occupy most of it. Especially the wife and daughter call for many provisions.

Rape and adultery are dealt with on the same lines. They are treated not as public wrongs but as matter for private compensation. A freeman is liable to pay one hundred staters; a slave in a like offence against a free person (both sexes are subjects for the offence) is liable for double that amount. If a man be taken in adultery (and 'adultery' perhaps includes unmarried as well as married women) notice is to be given to his kinsmen, if he be a freeman, to his lord, if he be a slave, and unless they redeem him in five days his captors may wreak their will on him. The possibility of the captor having played him false is provided for by his being put to his oath along with his friends (§ 2).

The *family* of free persons consists of man, woman, and children. The bond between man and woman seems to be loose. The woman's property is separate, and the man has at most a usufruct on her death until he marry again. There is no power of willing: the children, and eventually the kin or tribesmen, have a prospective title to the parent's property, and gifts by man to woman or by son to mother are restrained, lest the heir should be wronged. But during life the man is master of the children, and man, woman, and sons have each control of their own property, whether acquired by their own exertions or by inheritance, and each is responsible for his own debts. But there is a provision for recourse being had to the debtor's share of the family property in case of legal damages.

Otherwise no division is necessary while father and mother live; and any sale or pledge by any member of the other's property is forbidden and null. Women before marriage have apparently no control over property (§§ 5, 6, 12, 19).

The *separation of man and woman* may occur by divorce or by death. If a woman be divorced she can claim all her own goods brought to the marriage, and the half of what she has 'woven,' and the half of the produce of her property, and besides, if the man is the cause of the divorce, five staters. If she die childless, her representatives can claim the like (except the five staters). If her husband die leaving children, and she marries again, she can claim only her own goods and her husband's gifts. If he leave no children, she can claim in addition half of what she has woven, and a share with the husband's relatives of the produce (perhaps) of both her husband's and her own property. Careful provision is made against her carrying off anything belonging to her husband or children (§ 3).

On the *death of the father*, the property passes to the children: on the *death of the mother*, the father has control till his death or second marriage, but cannot sell or pledge without the consent of the children, being of full age. Afterwards it also passes to the children. The houses in the town, with their contents (i.e. probably the *instrumentum*), and the cattle fall to the sons. The rest of the property is divided among all the children, the sons taking two shares each, the daughters one each. If a daughter has received a dowry on marriage, she is excluded from the inheritance (§ 5).

In default of descendants (children, grandchildren, and great grandchildren are named), brothers, their children and grandchildren succeed. In default of these come sisters, their children and grandchildren. Then 'those belonging,' and last the family slaves (§ 5).

The *division of the goods inherited* is compulsory, if any desire it. The temporary possession is given to those desiring to divide: the division of animals (?), fruits, dress, and loose articles is made under the judge's arbitration. Other things are, in case of dispute, put up to auction, and the proceeds divided in the prescribed shares (§ 5).

If a father leave daughters only, they are *heiresses* to his property, and *have to be married* in accordance with law. The right to their marriage falls to their father's surviving brothers in order of age, eldest heiress to eldest brother, and so on; in default of such, then to the father's brothers' sons. No one had a right to more than one heiress. In default of these the right comes to applicants from the tribe, and eventually, under certain conditions, to any one the heiress chooses (§ 10).

If the heiress and the rightful claimant be too young to marry, she lives in her father's house, and he has half the produce of her property, but loses this if, when both are old enough, he refuse to marry. If she refuse him, or refuse to wait till he is grown, she retains the town-house and its contents, but forfeits to the disappointed claimant half of the other property (§ 10).

During her infancy the management of her property falls to the rightful claimant, if of age; if not, to her father's brothers; if there be no one belonging to her, then it falls to her father's brother[1] and her mother's brother, the person of the heiress being then under the mother's charge, or, after her death, under that of the mother's brother (§§ 10, 20).

It may be that a daughter has been already given in marriage by her father or brother, and afterwards, on their death, becomes heiress. If her husband be willing, she may still be married to the person 'belonging,' &c., and take with her all her property, if she has no children, and half if she has children. If she be a widow when she becomes heiress, she must marry, if she has no children; otherwise she need not. (So I understand § 10.)

Special provisions (now mutilated) are made for cases of marriage with an heiress or dealings with her property otherwise than according to law (§ 10 fin.). The last clause of the inscription refers to the possible existence of special orphan-judges, who would exercise the control previously given to kinsmen (§ 20).

Adoption is freely allowed to grown men. It is to be made in the market-place from the rostrum, when the citizens are assembled. The adopter has to give a dinner to his club. The adopter may, with the same publicity, sever the connexion, but has to pay a sum of money into the law-court, to be handed over as a 'guest-present' to him who ceases to be son (§ 14).

An adopted son, if there are no natural children, takes all the property, and has to perform (under penalty of forfeiture to the persons belonging) all the divine and human duties of the adopter. If there are natural children, he has only a daughter's share, and is not bound to perform the duties of the deceased (§ 14).

A *child* may be born *after divorce* of the mother. In this case a freewoman has to send the child to the father, and if he has no house, or cannot be found, or does not receive it, she may either put it away or rear it. If she put it away without this notice, she has to pay 50 staters. Similarly a householder has to send the child to the lord of the father, and if he does not receive it, her lord has the right of disposal, unless in a year's time she marry the same man again. Then the child is at the disposal of the man's lord. The

[1] Presumably this father's brother is already married, and therefore not 'belonging.'

payment in this case is 25 staters. Provision is also made for the child of an unmarried householder (§ 4).

The *child of a free woman by a slave* is free or slave according (apparently) as the cohabitation takes place in her or his residence. The free children only have a right to her property (§ 8, mutilated).

The *seller of a slave* is liable for the slave's wrongful acts for some time after sale (§ 9).

A *person redeemed* at his own request *from slavery* in a foreign state is at the disposal of the redeemer, till he has reimbursed him (§ 7).

Abduction before trial of any one claimed as slave or free is forbidden under penalties of a fixed sum, and so much for each day after three days (with a maximum of threefold the value?); and a similar provision is made for refusal to deliver after judgment has passed against the possessor. If, however, the slave has taken sanctuary, on formal summons and demonstration of the fact the penalty drops, and after a year the single value only need be given. Action in such matters cannot be taken against (nor, perhaps, by) one of the 'Rulers' during his tenure of office. In case of doubt the cause of freedom was to be favoured (§ 1).

Action to enforce the *obligations* (and rights?) *of a deceased* person for suretyship or a judgment debt, and some other cases, must be brought within a year (§ 11).

Creditors on a loan or judgment debt can *claim* the *surrender* of the property of the deceased if the persons 'belonging' refuse to satisfy them, but after surrender have no further claim (§ 17).

Creditors and suitors are also *protected against* any one making *gifts* which would leave the donor unable to satisfy them (§ 12).

A *judge is bound* to follow the evidence of witnesses, and to give credit to a denial on oath. In default of evidence he is himself to decide on oath. To provide due evidence many important acts are expressly directed to be done in the presence of a specified number of witnesses (two or three). Sometimes it is required that these witnesses should be freemen of full age ('runners, freemen').

The *sanctions of the law* are various. Fines, payable probably to the injured party, range from 200 staters to 1 obol. Things illegally removed have to be restored, together with the single or double value. Sales, pledges, gifts, promises, in contravention of the law or to the hurt of those subsequently entitled, are nullified.

In several places *reference* is made to other parts of this law and apparently also to previous laws. The application of the law is sometimes expressly limited to subsequent acts, and one passage (top of col. v.) gives a date, which may be that of the promulgation of this code.

The translation is intended to be faithful even at the expense of elegance, and not to be more or less definite and explicit than the original, except where the difference of the two languages makes it unavoidable. I have in most cases used the same word in English for the same word in Greek; but I have not distinguished between the three forms used for legal direction, viz. the infinitive (most frequent), the imperative, and the future indicative. The grammatical subject is often left to inference. δε I have translated both by 'but' and 'and.' The omission of this conjunction seems to be an indication of a new paragraph, which is in the original often denoted also by a small space left blank. Bracketed words are not in the Greek at all. Italics denote that the translation is doubtful; a row of dots that some words are not certainly legible. I have often put dots where the editors have given more or less probable supplements. However tempting it may be to fill up blanks by conjecture, I have learnt from the history of Gaius' text that such restorations of more than a few letters are rarely right, and are apt to mislead [1]. The Roman figures at the side denote the columns; the division into sections and paragraphs is my own.

The order of matters is as follows:—

§ 1. Claims to freedom or to possession of a slave.
§ 2. Rape, adultery, and the like.
§ 3. A woman's right to property after divorce or husband's death.
§ 4. Disposal of child born after divorce, or child of unmarried slave.
§ 5. Division of parents' property after death.
§ 6. Separate property of children and mother.
§ 7. Rights of redeemer in the redeemed captive.
§ 8. Status of child of free and slave parents.
§ 9. Responsibility for wrongful acts of a purchased slave.
§ 10. Marriage and property of heiress.
§ 11. Procedure in certain cases of suretyship and other obligations.
§ 12. Limitation of gifts in prejudice of those having claims.
§ 13. Prohibition to sell or pledge a pledged or disputed slave.
§ 14. Adoption.
§§ 15–20. Supplementary provisions, viz.:—
  § 15. Supplementary to § 1.
  § 16. Duty of judge.
  § 17. Supplementary to § 11.
  § 18. „ „ § 3.
  § 19. „ „ §§ 3 and 12.
  § 20. „ „ § 10.

[1] See preface to Krüger and Studemund's second edition of Gaius, pp. x–xiii.

§ 1.

1. Whoever is going to contend[1] about a freeman or slave, shall not lead him away before trial. And if he lead him away (the judge) shall adjudge (a fine of) ten staters in case of a freeman, five in case of a slave for leading him away, and shall judge that he let him go within three days. And if he shall not let him go, he shall adjudge (a fine of) a stater in case of a freeman, a drachm[2] in case of a slave for each day until he let him go, and with respect to the time the judge shall decide on oath.

And if he should deny leading him away, the judge shall decide on oath, unless a witness should declare.

And if the one contend that he is free and the other that he is a slave, the stronger shall be they who declare him to be free. And if they contend about a slave, saying each that it is his (slave), if a witness declare it, the judge shall decide according to the witness, but if they either declare for both or for neither, the judge shall decide on oath.

And if the possessor lose his suit, he shall let a freeman go within five days, but a slave he shall give back into hands (of his opponent). And if he let him not go or give him not back, (the judge) shall adjudge him to win in case of a freeman fifty staters, and a stater for each day until he let him go, and in case of a slave ten staters and a drachm for each day until he give him back into hands. And if the judge shall adjudge (a fine), there shall be exacted within a year threefold[3] or less, not more, and with respect to the time the judge shall decide on oath.

And if the slave, in whosesoever case he has lost his suit, take sanctuary, (the defendant) summoning him in the presence of two witnesses, runners[4], freemen shall point out (the fact) at the temple wherever[5] he be in sanctuary[6], either (the defendant) himself or another on his behalf; and if he summon not and point not out, he shall restore what has been written.

And if he even give him not back in the year, he shall besides restore the single values[7], and if he die, while the suit is in contention, he shall restore the single value.

And if (one when) Ruling[8] lead away (a slave), or another lead

[1] I. e. at law. The word (*μολεν*) is new, and is applied to both parties.
[2] A drachm was half a (silver) stater. An *Aeginetan* stater was worth about 2*s.* 8½*d.*
[3] *τα τριτρα.* If it means 'threefold,' we must take it that the maximum sum to be exacted in a year was threefold the value of the slave. Lewy translates 'a third part.'
[4] At seventeen years of age Cretans were admitted to the public athletic exercises.
[5] Or 'however.' [6] *ναεvει* from *ναός.*
[7] *τιμας* might be 'penalties,' and this translation would better suit the plural.
[8] *κοσμιον.* Aristotle, *Pol.* ii. 7. § 5, compares the ten *κόσμοι* of Crete with the five Ephori of Sparta; Cic. *R. P.* ii. 33.

away (a slave) of one Ruling[1], if he leave office, he shall contend, and if he lose his suit he shall restore . . . . what has been written.

To one that leads away (a slave) won in a suit . . . (or) pledged, there shall be no damage. II.

§ 2.

If one lie by force with a freeman or freewoman, he shall restore a hundred staters, but if with (the man or woman) of a clubless[2] person, ten staters. If a slave (force) a freeman or freewoman, he shall restore twofold, and if a freeman (force) a male or female householder[3], five drachms; and if a male householder (force) a male or female householder, five staters.

If one should overpower by force an indoor[4] slavewoman, he shall restore two staters, but if (he force) one already overpowered in the daytime, one obol[5], but if in the night, two obols: and the slave shall be more sworn[6].

If one attempt to lie with a freewoman in the hearing[7] of a kinsman, he shall restore ten staters, if a witness should declare it.

If one be taken in adultery[8] with a freewoman in (her) father's (house), or in (her) brother's, or in her man's, he shall restore a hundred staters, but if in another's fifty (staters). But if (he be taken) with the (woman) of a clubless man, ten (staters), and if a slave (be taken) with a freewoman, he shall restore twofold; if a slave with a slave, five (staters).

And he shall give notice in the presence of three witnesses to the kinsmen[9] of him that is taken, to redeem in five days: and to the lord of a slave, in the presence of two witnesses. And if he shall not redeem, he shall be at the disposal[10] of those who took him to deal with him however they will.

And if he say that he beguiled him, he that took him shall swear in the case of the fifty staters or more, himself with four others, each imprecating upon himself, and in the case of the clubless man, himself with two others, and in the case of the householder, his master with one other, that he took him in adultery and beguiled him not.

[1] 'On behalf of a Ruler' (Ziteler), but *κοσμιοντος* can hardly be that.

[2] *απεταιρος*. On the Cretan *ἑταιρίαι* see Athen. iv. 22 (p. 143).

[3] *ϝοικεα ϵ ϝοικεαν* (acc.) 'serfs' = *περίοικοι* Arist. *Pol.* ii. 7. § 3. Lysias explains *οἰκεὶς* in a law of Solon's by *θεράπων* (c. *Theomn.* p. 117).

[4] *ενδοθιδιαν*, or as two words, '(a slave) of his own from indoors.'

[5] Obol = one-sixth of a drachm, or one-twelfth of a stater.

[6] *ορμοτεραν*, i.e. have prior claim to swear (Ziteler)? have more title to credence?

[7] *ακευοντος καδαστα*. The Cretans are said to have used 'hear' in the sense of 'keep.' Hence perhaps 'in the care of a relative.'

[8] *μοικιον* = *μοιχείων* may perhaps, as in Attic, not be confined to married women.

[9] *καδεσταις*.

[10] *επι* with dative.

§ 3.

If a man and woman separate, she shall have her own things, which she had when she went to the man, and the half of the fruit, if it be from her own goods, and the . . . (part?) whatever it be (of) whatever she has woven, and five staters, if the man be the cause
III. of the divorce[1]; but if the man should say . . . . . the judge shall decide on oath.

But if she should bear off anything else of the man's, she shall restore five staters, and whatever she bear off, itself (shall she give back), and whatever she have taken away, itself shall she give back. And whatsoever things she shall deny (having taken), the judge shall adjudge the woman to deny on oath by Artemis, near the Amyclaeum near the Bowwoman[2]. And whatever any one shall take away from her[3], after she has denied on oath, (he) shall restore five staters and the thing itself. And if a stranger join in *packing up*[4], he shall restore ten staters, and twofold the thing itself, whatsoever the judge shall swear he has joined in *packing up*.

If a man should die, leaving children, if the woman will, she shall be wedded, having her own things, and whatever her man have given her according to what is written, in presence of three witnesses, runners, freemen; but if she bear off anything of the children's, there shall be right to sue.

And if he leave her childless, she shall have her own things, and of whatever she has woven the half, and of the fruit from within a . . . share with those belonging[5], and anything her man have given her as is written; but if she bear off anything else, there shall be right to sue.

And if a woman should die childless, there shall be given back to those belonging her own things, and the half of what she has woven, and the half of the fruit, if it be from her own things.

Guerdon[6] if man or woman will to give (they shall give) either dress or twelve staters or a piece of goods worth twelve staters, and not more.

If a female householder be separated from a male householder in his life or by his death, she shall have her own things; but if she bear off anything else, there shall be right to sue.

[1] *κερνοσιοι* = *χηρεύσεως*.
[2] Statue of Artemis with a bow.
[3] The Greek has the simple dative. Ziteler takes it as 'for her.'
[4] Others 'leading off.'
[5] *οι επιβαλλοντες* = *οἷς ἐπιβάλλει* (both expressions occur), i. e. those on whom a right or duty devolves by law, usually on the ground of kinship.
[6] *κομιστρα* 'legacy,' Lewy; 'marriage-gift,' Comparetti; 'gift for funeral expenses,' Bücheler; 'alimentation,' Bernhöft (who then translates 'or dress' instead of 'either dress'). It seems to mean simply 'a gift;' perhaps 'on parting:' so Ziteler doubtfully and Baunack.

§ 4.

If a woman bear a child while divorced, (she) shall send it to the man to his roof [1] in the presence of three witnesses. And if he should not receive it, the child shall be at the mother's disposal to bring up or to put away; and the kinsmen and the witnesses shall be more sworn whether they sent the child.

And if a female householder bear a child while divorced (she) shall send it to the lord of the man, who wedded her, in the presence of two witnesses. And if he shall not receive it, the child IV. shall be at the disposal of the lord of the female householder. And if she should be wedded again to the same man in the course of the first year, the child shall be at the disposal of the lord of the male householder, and he that sent it shall be more sworn and the witnesses.

A woman divorced, if she should cast away a child before sending according to what is written, shall restore in case of a free (child) fifty staters, in case of a slave five-and-twenty, if she lose the suit. But if a man has no roof whither she shall send it, or she do not see him, if she should put away the child, it shall be without damage (to her).

If a female householder unwedded should conceive and bring forth, the child shall be at the disposal of the lord of the father [2]. But if the father should not be alive, it shall be at the disposal of the lords of the brothers.

§ 5.

The father shall have power [3] over the children and over the goods, over the division (thereof), and the mother over her own goods. While they live, it shall not be necessary to divide; but if one should be cast in damages, division shall be made to him that is cast in damages as has been written.

And if one die, the roofs [1] in the city and whatever is in the roofs, in which no householder houses, housing on the spot, and the cattle and the strong-footed [4], such as are not a householder's, shall be at the disposal of the sons, and all the other goods they shall well divide, and the sons as many soever as they be shall be allotted [5] each two shares, and the daughters as many soever as they be, each one share.

(And they shall divide) the mother's things also, if she die, as

[1] στεγαν. (The word 'house' is wanted for οἶκος and its cognates.)
[2] According to Zitelmann, 'the father of the female householder.'
[3] των τεκνων καρτερον εμεν.
[4] τα προβατα και τα καρταποδα. Are 'the strongfooted' horses and mules? Cf. μώνυχες ἵπποι. Or oxen? or all large beasts? In Pind. *Ol.* xiii. 114, it means a 'bull.'
[5] Λανκανεν = λαγχάνειν. It seems to be in fact, 'to take by inheritance.'

. . . . And if there be no goods but there be a roof, the daughters shall have allotted to them, as has been written.

And if the father being alive will to give to her that is being wedded, he shall give according to what is written and not more. And to whomsoever he before gave or promised[1] this shall she
V. have and not be allotted other things. Whatever woman has no goods either from her father's gift or her brother's, or his promise or by allotment *from the time that*[2] the Aethalian troop, Kyllos and friends, were rulers[3], these women shall have allotments, but for those previous there shall be no right to sue.

If a man or woman die, if there be children or children's children or children of these, they shall have the goods. And if there be none of these, but there be brethren of the deceased and brethren's children or children of these, they shall have the goods. And if there be none of these, but there be sisters of the deceased and sister's children or children's children, they shall have the goods. And if there be none of these, (then) to whomsoever it belongs, whenever it be[4], they shall take the goods to themselves. And if there should not be any belonging, then whoever be the lot[5] of the house, these shall have the goods.

And if (of) those belonging, some will to divide the goods and some do not, the judge shall adjudge all the goods to be at the disposal of those who will to divide, until they divide. And if, after the judge has adjudged it, (any one) by force *disturb*[6] or lead away or bear off, he shall restore ten staters and the thing itself twofold. And (in respect) of mortals[7] and fruit and clothing and bracelets and superficial[8] goods, if they will not to divide . . . . . shall decide on oath in reference to the matters in contention. And if in dividing the goods they do not agree about the division, they shall put up the goods for sale, and selling to whosoever offers most, they shall allot themselves (of) the value each the share belonging. And when they divide the goods, there shall be present three or more witnesses, runners, freemen.

VI. If he give to a daughter, (it shall be) according to the same (rules).

[1] ἐπισπενσε, which recalls the Roman *spondere*.

[2] αι οκα = ᾗ ὅτε, 'as when.' Baunacks understand it 'as was prescribed when.'

[3] Aristotle, *Pol.* ii. 7. §§ 5–7, says the Cretans chose their rulers from certain clans, and that often the rulers were deposed by conspiracies either of their fellows or of private persons. Another Cretan inscription dates by the rule of the Aethalians (Cauer's *Delectus Inscr. Graec.*, No. 121, ed. 2).

[4] I. e. 'at whatever point in the line of succession.'

[5] ο κλαρος, i. e. the whole number of householders belonging to the family. Ephorus (as Athenaeus, vi. p. 263, tells us) said the Cretan slaves were called κλαρῶται.

[6] Or 'enter.'

[7] 'Animals,' Baunacks; 'perishable things,' B. & Z.

[8] επιπολαιον is 'moveables' (see Liddell and Scott, s. v. ἐπιπλα) = *supellex*.

§ 6.

While the father lives, no one shall buy or take in pledge from the son (any) of the father's goods, but whatsoever he have himself acquired or had allotted to him, he shall sell if he will. Nor shall the father (sell or promise) the children's goods, whatever they have themselves acquired or had allotted to them, nor shall the man sell or promise the woman's, nor the son the mother's. And if any one should buy or take in pledge or obtain promise, and it is written otherwise than these writings are written [1] . . . . the goods shall be at the disposal of the mother and at the disposal of the woman, and he who sold or gave in pledge or promised shall restore twofold to him that bought or took in pledge or obtained promise, and if there be any other matter of damage, the single (value): and for matters previous there shall be no right to sue. And if the opposite contendant contend in respect of the thing, whatever they are contending about, that it is not the mother's or the woman's, he shall contend in whatever way it belongs (to contend) before the judge as each thing is written [2].

And if the mother die leaving children, the father shall have power over the mother's things, but shall not sell nor pledge unless the children being runners approve. And if one should buy or take in pledge otherwise, the goods shall be at the disposal of the children, and he that sold or he that pledged shall restore to him that bought or took in pledge the double of the value, and if there be any other matter of damage, the single (value). But if he wed another woman, the children shall have power over the mother's things.

§ 7.

And if . . . . being held in bondage from a foreign state, and by his [3] choice some one shall redeem him, he shall be at the disposal of the redeemer, until he pay back what belongs. And if they do not agree about the amount, or (it be asserted) that he redeemed him without his [3] choice, the judge shall decide on oath in reference to the matters in contention.

§ 8.

? ?[4] . . . (if) coming to a freewoman he wed her, the children shall be free. But if a freewoman to a slave, the children shall be slave. VII.

[1] I. e. if the contract is not according to the provisions of this law.
[2] I. e. he shall carry on the appropriate suit according to the specific requirements of the law.
[3] I. e. the captive's.
[4] At least fourteen letters, which compose no intelligible words (ΟΣΣΑΙΘΕΡΟΤΟΝΑΝ).

And if there be born from the same mother free and slave children, if the mother die, if there be goods, the free children shall have them; but if freemen should not be forthcoming, those belonging shall take them to themselves.

§ 9.

If (one) after buying a slave from the market, shall not *export*[1] him within sixty days, if he have wronged any one before or after[2], there shall be right of suit to him that has acquired (him).

§ 10.

An heiress[3] shall be wedded to her father's brother, the eldest of those that are. And if there be more heiresses and father's brothers, (the second) shall be wedded to the next eldest. And if there be no father's brothers, but brothers' sons, (she) shall be wedded to one that is (child) of the eldest. And if there be more heiresses and more brothers' sons, (the next eldest heiress) shall be wedded to another who is next to him that is (child) of the eldest. And he that belongs shall have one heiress and not more.

And so long as he to whom it belongs to wed be unripe, or the heiress (be unripe), the heiress shall have the roof, if there be one, and he to whom it belongs to wed shall have allotted to him the half of the produce of all. And if he to whom it belongs to wed, being aloof from running[4], will not, (though) grown, to wed her (though) grown, all the goods and the fruit shall be at the disposal of the heiress until he wed her. But if being a runner he to whom it belongs will not to wed her grown (and) willing to be wed, the kinsmen of the heiress shall contend[5], and the judge shall adjudge him to wed within two months; and if he wed her not, as is written, she having all the goods (shall be wedded) to him that belongs if there be another. And if there should be none belonging, she shall be wedded to whomever she will of those of the tribe who ask.

VIII. And if (when) grown she will not be wedded to him that belongeth, or he that belongeth be unripe, and the heiress . . . . the heiress shall have the roof, if there be one, in the city and whatever is in the roof, and having allotted to her the half of the other things she shall be wedded to another, whomever she will of those of the tribe who ask; and a portion of the goods shall be given to one[6].

[1] *περαιοσει*. Bücheler takes it of 'fixing a limit;' so that otherwise the law limits responsibility to sixty days.

[2] Before or after the purchase? or, as Ziteler prefers, the promulgation of this law?

[3] *α πατροιοκος* = *ἡ πατρόϝυχος*.

[4] *αποδρομος*, i. e. is not yet old enough to belong to the public athletic classes. Cf. Hesych. v. *ἀπάγελος*.

[5] I. e. bring an action against him.

[6] I. e. to the first entitled to marry her (Baunacks).

And if there should not be any persons belonging to the heiress as is written, she, having all the goods, shall be wedded to whomever of the tribe she will. And if no one of the tribe should will to wed her, the kinsmen of the heiress[1] . . . . . not . . . to wed her; and if one wed her within thirty days from the time they have (so) said, (well), but if not she shall wed another whomever she may be able.

And if, her father or brother having given her (in marriage), she become heiress, if he to whom they gave her being willing to wed, she should not be willing to be wedded, if she has had children, (then) having allotted to her (half) of the goods as has been written she shall be wedded to . . . .; but if there should be no children, having all (the goods) she shall be wedded to him that belongs, if there be one, and if not, (then) as has been written.

If a man should die leaving children to an heiress, if she will she shall be wedded to whomever of the tribe she can, but without compulsion. But if the dead man should leave no children, she shall be wedded to him that belongs, as has been written. And if he to whom it belongs to wed the heiress should not be resident and the heiress be ripe, she shall be wedded to him that belongs[2], as has been written.

And (one) shall be heiress, if there be no father or brother from the same father. And over the working of the goods the father's brothers shall have power . . . . the half as long as she be . . . . And if while she is unripe, there should be no one belonging, the heiress shall have power over the goods and the fruit, and so long as she be unripe, she shall be brought up with her mother; and if there should not be mother, she shall be brought up with her mother's brothers.

And if any should wed the heiress and it has been otherwise written . . . . those belonging (if) he leave an heiress . . . . IX.[3]
mother's brothers to pledge . . . . the sale shall be lawful, and the . . . . (if) any one should buy goods or take in pledge any of the goods of the . . . ., the goods shall be at the disposal of the heiress, and he that sold or pledged shall to him that bought or took in pledge restore, if he lose his suit, twofold, and if there be any other damage he shall besides restore the single value, as . . . . and for matters previous there shall be no right to sue. And if the opposite contendant contend about the thing for which they are contending that it is not the heiress's, the judge shall decide on oath; and if he should win that it is not the heiress's, he shall contend, in whatever way it belongs (to contend) as each thing is written.

[1] Probably to be supplied thus: 'shall announce in the tribe that no one wills to wed her.'
[2] The next in legal succession.
[3] The last line of col. viii. and the first ten of col. ix. are partly lost.

§ 11.

If a man should die having become surety or having lost a suit, or owing *securities*[1], or having *cheated* or having *made an agreement*, or another to him[2], (he) shall contend in the course of the first year: and the judge shall give judgment in reference to the matters in contention. If he contend upon a suit won, the judge and the registrar if he be alive and a citizen, and the witnesses who belong (shall declare), and of a suretyship and of *securities*, and of *cheating* and of an *agreement*, those who belong shall declare as witnesses. And if they fail, he shall adjudge that (the plaintiff), himself on oath and the witnesses, shall win the single value[3].

If a son become surety, so long as his father live, he shall be led away, himself and the goods, whatever he has acquired.

If any one do not give back . . . . [1½ lines broken] . . . . if grown witnesses declare, in case of a hundred staters or more, three (witnesses), in case of less as far as ten staters, two, in case of less, one, he shall give judgment in reference to the declarations made. And if the witnesses should not declare, ... [2 lines broken]
X. . . . . he shall either deny on oath or . . . . [15 lines wanting].

§ 12.

. . . . son to mother . . . . a hundred staters or less, but not more; and if (he) should give more, if those belonging will, they shall pay back the money and have the goods. But if any one should give while owing money, or when cast in damages or while a suit is in contention, if the remainder should not be of the worth of the damages, the gift shall be of no good.

§ 13.

(One) shall not buy a man[4] that is pledged, before he that pledged have redeemed[5] (him), nor one who is under contention, nor receive (such as gift?), nor obtain promise (of him), nor take (him), in pledge. And if any one should do any of these things, it shall be of no good, if two witnesses should declare (it).

§ 14.

Adoption shall be whenever[6] any one will. Adoption shall be

[1] *ενκοιοταν*. Cf. Hesych. *κοῖον· ἐνέχυρον* (Baunacks, and Leo *apud* Bernhöft).

[2] I.e. either 'another die in debt &c. to him' (which however introduces no new position), or 'another be in debt &c. to the dead' (which introduces the case of the dead being creditor).

[3] Baunacks take it, 'he shall adjudge their matters, and that the witnesses pay the single value.' I have followed Bücheler.

[4] *ωτροπον = ἀνθρωπον*, i. e. a man slave. So in § 15. Elsewhere 'man' represents *ανερ*.

[5] Baunacks are right in reading *αλλυσεται*.

[6] Others 'from whence,' i. e. from what family.

in the market-place, when the citizens are assembled, from the stone from which addresses are made. And the adopter shall give to his own club a victim and a pitcher of wine.

And if (the adopted) take over all the goods and there *dwell* not with him natural children, he shall perform the divine and human (duties) of the adopter and take them on himself as is written for natural children. And if he will not to perform them as is written, those belonging shall have the goods. But if there be natural children to the adopter, with the males (shall share) the adopted as the females have allotted to them from their brothers; and if there XI. be no males but females, the adopted (male) shall have an equal share: and he shall not be obliged to perform the duties of the adopter and to take to himself the goods, whatever the adopter have left; and more the adopted shall not come to.

And if the adopted should die without leaving natural children, the goods shall return to those who belong to the adopter.

And if the adopter (will ?), he shall renounce in the market-place from the stone from which addresses are made, when the citizens are assembled. And he shall hand over . . . staters to the law-court. And the registrar shall give them back as a guest-present to him that was renounced.

And a woman shall not adopt, nor shall an ungrown male.

And these shall be dealt with, as he has written these writings, and for matters previous, however any one be, there shall no longer be right to sue either for the adopted or against the adopted.

§ 15.

Whoever leads away a man[1] before trial, shall always be received[2] (?).

§ 16.

A judge, whatever it has been written he should judge according to witnesses or as denied on oath, shall so judge as has been written; and in respect of other matters he shall decide on oath in reference to the matters in contention.

§ 17.

If (a man) die, owing money or having lost a suit, if those to whomsoever it belongs will to take over the goods, to restore for him the damages and the money to whomsoever he owes, they shall have the goods. And if they will not, the goods shall be at the disposal of those who won the suit or those to whom he owes the

[1] ανδρορον, i. e. a man slave.

[2] We should rather have expected: 'Any one may receive a man whom a suitor leads away before trial.' And so the sentence is generally understood.

money, and other damage there shall be none to those who belong. And there shall be led away on account of the father the father's goods, and on account of the mother the mother's goods.

§ 18.

A woman who ever separates from a man, if the judge shall adjudge an oath, shall deny on oath within twenty days in the presence of the judge. Whatever he imputes to her, he shall give notice (thereof) *at the commencement* of the suit to the woman and to the judge and to the registrar the fourth day before in the presence of . . . .

XII. (14 lines wanting.)

§ 19.

If a son gave goods to his mother or a man to a woman, as had been written before these writings, there shall be no right to sue; but for the future he shall give as has been written.

§ 20.

Heiresses, if there be no orphan-judges, so long as they are unripe, shall be dealt with in accordance with what has been written. And *when*ever, there being no one belonging and no orphan-judges, an heiress be brought up with her mother, the father's brother and the mother's brother, who have been written, shall manage the goods and the produce, however they best can, until she be wedded. And she shall be wedded, when aged twelve years or older.

H. J. Roby.

THE DEACON AND THE JEWESS; OR, APOSTASY AT COMMON LAW.

IN the year 1222, Archbishop Stephen Langton held at Oxford a provincial council, and of this council one result was that a deacon was burnt, burnt because he had turned Jew for the love of a Jewess.

I propose here to set in order the scattered evidence that we have for this story. This, so far as I am aware, has not yet been done, and it seems worth doing. The story became famous, for the passage in which Bracton made mention of it became the main, almost the only, authority for holding that, without help from any statute, English law can burn a heretic or, at least, an apostate. We have indeed no warrant for saying that from the death of this deacon until the death of Sautre in 1400 (whether Sautre was burnt under the statute of that year or under the common law, must not here be asked), no one in England was burnt for heresy, but we may say with some confidence that during this long period, near two hundred years, if English orthodoxy had a victim, there is no known record of his fate [1].

Now for just so much of the tale as is told above we have testimony ample in quantity and excellent in quality. But I have purposely used a loose phrase:—the apostate's death was a 'result' of the council. If we strive to be more precise and ask by what authority he was committed to the flames, who passed, who executed the sentence, we have before us a problem difficult but interesting. Not only in course of time did the solid tragic fact attract to itself some floating waifs of legend and miracle, but even our best witnesses have not been so careful of their words as doubtless they would have been had they known that they were writing for an ignorant nineteenth century. We must collate their testimonies, mark what they say, also what they do not say. So doing we shall be drawn into noticing another story about a man and a woman who were immured (whatever 'immured' may mean), and this story also deserves being brought to light, for it is very curious.

That the council was held is quite certain. The scene and time we can fix exactly. The scene was Oxford, or, to be more particular, the conventual church of Osney [2]. The day is variously described, the day on which one reads in the gospel, 'I am the good

[1] Report of Ecclesiastical Courts Commission, 1883, Historical Appendix, p. 52, a paper proceeding from the present Bishop of Chester.

[2] Annales Monastici (Osney), vol. iv. p. 62.

Shepherd,' the day on which one sings in the introit, 'The earth is full of the mercy of the Lord;' but all descriptions come to this, it was the 17th of April, and the Second Sunday after Easter, in the year 1222. The canons which the council published we have[1]. Naturally enough, being general ordinances, they say nothing of the deacon; but there are two of them which claim brief attention.

It was ordained that no beneficed clerk, or clerk in holy orders, should take any part whatever in the judicial shedding of blood[2]. This, even if it stood by itself, would assure us that no sentence of death was pronounced by the council. It may be that this canon was habitually disobeyed, or obeyed only according to its very letter. At this time, and for many years afterwards, the regular judges in our King's Court (to say nothing of abbots and even bishops sent out as justices in eyre) were for the more part ecclesiastics, and the judicial bench was often a step to the episcopal throne. But this seems to have been a scandal to churchmen of the straiter sort, and it would be quite one thing for this or that ordained clerk to hold pleas of the Crown, leaving to some lay associate the actual uttering of the fatal *suspendatur*, quite another for an ecclesiastical council to break while in the very act of publishing a law for the church[3].

Also the council had something to say about the mingling of Jews with Christians, something which suggests, what indeed seems the truth, that at this time the Jews in England, despite the exactions of their royal protector, and despite occasional outbursts of popular fury, were a prosperous thriving race. Jews are not to have Christian servants, it being contrary to reason that the sons of the free woman should serve the sons of the bond[4]. Again, there being unfortunately no sufficiently visible distinction between Jews and Christians, there have been mixed marriages or less permanent unions; for the better prevention whereof, it is ordained, that every Jew shall wear on the front of his dress tablets or patches of cloth four inches long by two inches wide, of some colour other than that of the rest of his garment[5]. We might guess that the council was moved to this decree by the then recent and shameful crime of the apostate deacon. But there is no need for any such supposition, for in this and in most of its ordinances the Oxford Council was but endorsing and re-enforcing the acts of a still more august assembly,

[1] Wilkins, Concilia, vol. i. p. 585. [2] Cap. 9.

[3] See Grossteste's protest against the appointment of the Abbot of Ramsey as a justice in eyre in 1236; Letters of Grossteste (ed. Luard), p. 105.

[4] Cap. 39.

[5] Cap. 40. It seems that this regulation was enforced by statute in 1275. See Flores Historiarum ('Matthew of Westminster') for that year. In Statutes of the Realm (vol. i. p. 221) this appears as a statute of uncertain date.

the Fourth Lateran Council held by Pope Innocent the Third in the year 1215.

The Lateran Council had prohibited the clergy from taking part in judgment of blood [1], also it had ordained that Jews and Saracens should wear some distinctive garb [2], lest under cover of a mistake there should be an unholy union of those whom God had put asunder. But this was but bye-work; the suppression of flagrant heresy had been the main matter in hand. Of heresy England indeed had known little, almost nothing. It is true that in 1166 some heretics, Publicani or the like, had been condemned by an ecclesiastical council (this council also was held at Oxford), had been handed over to the secular power, and then by the king's command whipt, branded, and exiled; some of them, it seems, perished very miserably of cold and hunger [3]. But even these were foreigners, Germans, and the writer who tells us most about them boasts that though Britain was disgraced by the birth of Pelagius, England, since it had become England, had been unpolluted by false doctrine. He boasts also, and apparently with truth, that well-timed severity had been successful [4]. Only one other case is recorded, and of this we know next to nothing. In 1210 an Albigensian was burnt in London; we are told just this and no more [5]. It must not surprise us therefore if English law had no well-settled procedure for cases of heresy; there had been no heretics. But of course it was otherwise elsewhere. When the Lateran Council met the Albigensian war had been raging for some years, and it had been a serious question whether a considerable tract of France would not be permanently lost to the Catholic Church. So one great object of the council was to impress upon all princes and potentates the sacred duty of extirpating heretics. A definite method of dealing with them was ordained [6]. They were to be condemned by the ecclesiastical powers in the presence of the secular powers or their bailiffs (*saecularibus potestatibus praesentibus aut eorum baillivis*) and delivered to due punishment, clerks being first deprived of their orders. Also it was decreed that if the temporal lord, when required and admonished by the church, neglected to purge his land of heresy, he should be excommunicated by the metropolitan and the other bishops of the province. If then for the space of a year he should still be contumacious, that was to be signified to the Pope,

[1] Cap. 18. [2] Cap. 68.

[3] The original authorities seem to be Rad. de Diceto (ed. Stubbs), vol. i. p. 318; William of Newburgh (ed. Howlett), vol. i. p. 131; Mapes de Nugis Curialium (Camden Society), p. 63; Ralph of Coggeshall (ed. Stubbs), p. 122.

[4] Will. Newburgh, l.c.

[5] Liber de Antiquis Legibus (Camden Society), p. 3. As to these two cases see the paper by the Bishop of Chester referred to above.

[6] Cap. 3. This is Decretal. Gregor. lib. 5. tit. 7. cap. 13.

who would thereupon discharge his subjects from their allegiance. It was from taking part in such legislation as this that the English bishops had but lately returned when they met at Oxford. The council at Oxford, having recited and republished the Lateran canons, can have had little doubt as to how it ought to deal with a deacon who had turned Jew.

It will hardly be a digression, and indeed may lead us to the right point of view, if we notice that this same Lateran Council made (or if the word *made* be objectionable, then let us say *caused*) a great change in English criminal law. It abolished the ordeal, or rather it made the ordeal impossible by forbidding the clergy to take part in the ceremony[1]; no more remained for the council of the English king (the king himself was yet a boy) than to find some substitute for a procedure which was no longer practicable[2]. We may respect the motives which urged Blackstone to protest that no change in English law could be made by a body of prelates assembled at Rome[3]; but we shall scarcely understand the history of the time unless we understand that the exclusive power of the church to rule things spiritual,—and the ordeal, the judgment of God, was a thing spiritual,—was unquestioned. It may be difficult now to grasp the old theory of Church and State, the theory of the two swords; a distinction between things spiritual and things temporal may seem to us vain and impossible; still we must reverence facts, and the theories of a time are among its most important facts. Our own doctrine of sovereignty, our modern definitions of law, are out of place if we apply them to the middle ages. They will bring us but to some such unprofitable conclusion as that there were no sovereigns, no political communities, no law, nothing but 'dormant anarchy.'

Though it may delay us from our story, there is yet one question which should be asked and answered before we can fully comprehend the evidence that is to come before us. Who at Oxford in the year 1222 was the natural and proper representative of temporal power, who was the *manus laicalis?* Doubtless the sheriff of Oxfordshire. Now it happened that the sheriff of Oxfordshire was one of the most notable men in England; more than king in England ('plusquam rex in Anglia') some said[4]. He was Fawkes of Breauté, just at the full height of his power, a man not unlikely to act in a high-handed imperious way without much regard for forms and precedents, a man who very likely was already plotting revolt

[1] Cap. 18.
[2] See the orders issued to the justices in eyre; Foedera, vol. i. p. 154. Among the justices were five bishops and one abbot.
[3] Comment., vol. iv. pp. 344–5.
[4] Ann. Monast. (Tewkesbury), vol. i. p. 64.

and civil war, a man somewhat given to disseising and otherwise pillaging the clergy, and therefore, it may be, not unwilling to do the church a service if that service would cost him nothing. He was soon to find that the church could be a terrible enemy, that of all his foes Langton was the most resolute.

These things premised, we may call the witnesses, and first of all Bracton, not that his testimony is the earliest but because it is perhaps the best and certainly the best known. A lawyer writing for lawyers, he would be likely to see the case in its legal bearings and to speak of it carefully. We cannot assign any very precise date to his evidence, and he may well have given it between thirty and forty years after the event. Still it is from round about the year 1222, the year of the Oxford Council, that he collected the great mass of his case law. That was the great time when there were great judges whose judgments were worthy of record. Of their successors, his own contemporaries, he seems for some reason or another to have thought but meanly. It was to the examination of old judgments, as he himself expressly says, that he had given his mind[1]. He is speaking then, if not of his own time, yet of a time that he has studied. He has been telling us that a clerk convicted of crime is to be degraded by the Court Christian[2]. He is to undergo no further punishment, degradation is punishment enough, 'unless indeed he is convicted of apostasy, for then he is to be first degraded and then burnt by the lay power (*per manum laicalem*), as happened at the Oxford Council holden by Stephen Archbishop of Canterbury of happy memory, touching a deacon who apostatised for a Jewess, and who, when he had been degraded by the bishop, was at once (*statim*) delivered to the fire by the lay power.' Two things we remark. In the first place there is no talk of any sentence of death being pronounced by any court, temporal or spiritual; the miscreant was burnt at once, on the spot, so soon as he has been degraded: there is no talk even of any royal writ. Secondly, the case is good law; it is a precedent to be followed when occasion shall require.

But Bracton does not stand alone. If he did, we should perhaps have some cause for doubting his testimony. It was an age very fertile of chroniclers and annalists, and there are some dozen books in which we may hope to find a trustworthy and early, if not quite contemporary, account of an event which took place in 1222, an event which, though neither very marvellous nor of first-rate importance, was still picturesque and unprecedented. Some of these books are silent. The silence most to be regretted is that of Roger of Wendover. We would gladly have had an account from

[1] Bracton, f. 1.

[2] Bracton, f. 123 b.

one so careful and so well informed. But he is taken up with more momentous matters, the loss of Damietta and a serious riot in London, not suppressed without the aid of Fawkes and his soldiery. Beyond this he tells of nothing but terrible tempests. And, indeed, the weather this year was abominably bad; about this all our authorities are agreed. It is the only fact that the annalist of Margan in Glamorgan found worthy of remark. The annals of Burton, of Worcester, and of Bermondsey do not even mention the council; those of Winchester and Tewkesbury tell us that the council was held, but tell us no more. The annals of Osney, to which we look hopefully, say merely that the council was held, and held at Osney. But all this silence cannot, I believe, be reckoned as negative evidence. The monastic annalist, working with no definite plan, with no consistent measure for the greatness of events, jotted down what might interest his house or had struck his fancy, making sometimes what seems to us a very capricious selection of facts. He could pass by the fate of the perverted deacon, but he could also pass by very many things which, tried by any test, were much better worth recording.

But from the Cistercian house of Waverley in Surrey we have this[1]:—'In this council an apostate deacon who had married (*duxerat*) a Jewess was degraded and afterwards burnt. Also a countryman (*rusticus*) who had crucified himself was immured for ever.' A somewhat longer version comes from Dunstable[2], and it seems to be the version of one who likely enough was an eye-witness, Prior Richard Morins, who was describing events as they happened year by year[3]. He had certainly been at the Lateran Council[4], and I suppose that it was his duty to be at the Oxford Council also. He must have been a careful man of business, for these Dunstable Annals are a long detailed record of litigation and legal transactions described in technical legal language. What he says is this:—'In this council there was condemned to the flames, after his degradation, a deacon who for the love of a Jewess had been circumcised; and he was burnt with fire outside the town by the king's bailiffs who were present on the spot (*ibidem praesentes*). There also another deacon was degraded for theft. Also a woman who gave herself out to be Saint Mary and a youth who had given himself out to be Christ and had pierced his own hands, side and feet, were immured at Banbury.' The prior certainly says that the pervert was condemned to the flames in (not *by*) the council. Could we now draw

[1] Ann. Monast., vol. ii. p. 296. Dr. Luard (Preface, p. xxxi) regards this as a contemporary record of events.
[2] Ann. Monast., vol. iii. p. 76.
[3] Dr. Luard's Preface, p. x.
[4] p. 44.

his attention to these words he would, I think, say (after a grumble about hypercriticism) that of course the council did not in so many words pronounce a sentence of death, but would add that it did what was for practical purposes the same thing, it convicted the man of apostasy and handed him over to the secular power; he might add, too, that no one for whom he wrote would have imagined that a *judicium sanguinis* was uttered by this assembly of ecclesiastics. Of any temporal court he says nothing, and nothing of any royal writ, but the king's bailiffs were present on the spot, as required by the Lateran Council, and they burned the convict.

The account which comes to us from the Abbey of Coggeshall in Essex is yet fuller[1]. It is contained in a very valuable chronicle, and in all probability was written within some five years after the event. Archbishop Stephen held a council at Oxford, and there 'degraded an apostate deacon, who for the love of a Jewess had circumcised himself. When he had been degraded he was burnt by the servants of the lord Fawkes. And there was brought thither into the council an unbelieving youth along with two women, whom the archdeacon of the district accused of the most criminal unbelief, namely that the youth would not enter a church nor be present at the blessed sacraments, nor obey the injunctions of the Catholic Father, but had suffered himself to be crucified, and still bearing in his body the marks of the wounds had been pleased to have himself called Jesus by the aforesaid women. And one of the women, an old woman, was accused of having long been given to incantations and having by her magic arts brought the aforesaid youth to this height of madness. So both being convicted of this gross crime, were condemned to be imprisoned between two walls until they died (*jussi sunt inter duos muros incarcerari quousque deficerent*). But the other woman, who was the youth's sister, was let go free, for she had revealed the impious deed.' We notice the appearance of Fawkes of Breauté, or rather of his underlings, remembering however that the *ministri domini Falcenis* would also be the *ballivi domini Regis* mentioned by the Prior of Dunstable. We notice also that here there is no sentence of death, no royal writ.

Of about equal value and of about even date must be the account which, according to Dr. Stubbs, comes from some nameless canon of Barnwell, the account which is preserved in the Memoriale of Walter of Coventry[2]. 'A priest and a deacon were there degraded inside the church before the council by the lord of Canterbury, the priest for homicide, the deacon for sacrilege and theft. But another deacon

[1] Ralph of Coggeshall, p. 190.
[2] Historical Collections of Walter of Coventry. Preface by Dr. Stubbs, vol. ii. p. ix.

had sinned enormously; he had renounced the Christian faith; blaspheming and apostatising, he had caused himself to be circumcised in imitation of the Jewish rite. He was degraded by the lord of Canterbury outside the church and before the people. Relinquished by the clergy, he was as a layman and captured apostate delivered over to be condemned by the judgment of the lay court, and being at once (*statim*) delivered to the flames he died a miserable death. In degrading the priest and the deacons, when the lord of Canterbury had stripped off the chasuble, or stole, or whatever it might be, by lifting it with the end of his pastoral staff, he made use of these words, "We deprive you of authority" (*Exautoramus te*). There was brought into the council a layman who had allowed himself to be crucified, and the scarred traces of the wounds might be seen in his hands and feet and his pierced side and his head. There was brought also a woman who, rejecting her own name, had caused herself to be called Mary Mother of Christ. She had given out that she could celebrate mass, and this was manifested by some proofs which were found, for she had made a chalice and patten of wax for the purpose. On these two the council inflicted condign punishment, that enclosed within stone walls (*muris lapideis inclusi*) they should there end life.' One peculiarity of this life-like account is that it says nothing about the Jewess. But we have also to note the mention of the lay court, for of this we have hitherto heard nothing. The deacon was delivered over to be condemned by its judgment. These are the important words: 'velut laicus et apostata captus traditur judicio curiae laicalis condemnandus.' Nevertheless we do not read that he was in fact condemned by or brought before any secular tribunal; on the contrary, he was forthwith committed to the flames.

I believe that I have now stated what may be called the first-rate evidence, and that it is far more than sufficient to establish the chief facts. It will not escape the reader's notice that all these early accounts of the matter are very sober, strikingly sober when the nature of the story and its subsequent fate are considered. We come to witnesses of a somewhat less trustworthy kind. And first there is Matthew Paris, who died in 1259. Roger of Wendover, as already said, does not even mention the Oxford Council. When Paris was absorbing Wendover's work into his own Chronica Majora, he inserted a notice of the Council and of the deacon's death. A more elaborate tale he set forth in his Historia Minor or Historia Anglorum, and to this we will turn first since there he cites his authority, and this authority an eye-witness, one Master John of Basingstoke, Archdeacon of London[1]. Of any such Archdeacon of

[1] Historia Anglorum (ed. Madden), vol. ii. p. 254.

London nothing is said elsewhere, but a John of Basingstoke was Archdeacon of Leicester[1]. Paris seemingly knew him well, and doubtless he is the person meant. He was a friend of Simon de Montfort and died in 1252. Paris, on the occasion of his death, speaks of him as a very learned man[2]. He had been to Greece and had learnt Greek, had learnt it from a young Greek girl of whose wonderful accomplishments he had strange things to tell; she could foresee eclipses, pestilences and even earthquakes, and had taught the archdeacon all that he knew. Perhaps while seated at her feet the archdeacon not only learnt but forgot; perhaps as a traveller he acquired a habit of telling good stories. At any rate the story that he told to Paris was this:—'An English deacon loved a Jewess with unlawful love, and ardently desired her embraces. "I will do what you ask" said she "if you will turn apostate, be circumcised and hold fast the Jewish faith." When he had done what she bade him he gained her unlawful love. But this could not long be concealed, and was reported to Stephen of Canterbury. Before him the deacon was accused; the evidence was consistent and weighty; he was convicted and then confessed all these matters, and that he had taken open part in a sacrifice which the Jews made of a crucified boy. And when it was seen that the deacon was circumcised, and that no argument would bring him to his senses, he solemnly apostatised before the archbishop and the assembled prelates in this manner:—a cross with the Crucified was brought before him and he defiled the cross[3], saying, "I renounce the new-fangled law and the comments of Jesus the false prophet," and he reviled and slandered Mary the mother of Jesus, and made a charge against her not to be repeated. Thereupon the archbishop, weeping bitterly at hearing such blasphemies, deprived him of his orders. And when he had been cast out of the church, Fawkes, who was ever swift to shed blood, at once carried him off and swore, "By the throat of God! I will cut the throat that uttered such words," and dragged him away to a secret spot and cut off his head. The poor wretch was born at Coventry. But the Jewess managed to escape, which grieved Fawkes, who said, "I am sorry that this fellow goes to hell alone."'

Eye-witness and archdeacon though Master John of Basingstoke may have been, we cannot believe all that he said. In the first place, he will have the deacon's head cut off, while all our best witnesses agree about the burning. In the second place, either the charge of crucifying a boy is just the mere 'common form' charge against the Jews (the Jews were always crucifying boys, as every

[1] See lists of Archdeacons of London and of Leicester in Hardy's Le Neve.
[2] Chron. Maj., vol. v. p. 284.
[3] Et minxit super crucem.

one knew[1], and were now and again slaughtered for it), or else the archdeacon has muddled up the history of the deacon with that of the labourer who was immured for crucifying himself. Nor does it seem likely that the assembled prelates gave the apostate an opportunity for manifesting his change of faith in a fashion at once very solemn and very gross. But what is said of Fawkes of Breauté does deserve consideration. Fawkes when this story was told was long since banished and dead, and it may well be that he had become a bugbear, a mythical monster to whom, under Satan, mischief of all sorts might properly be ascribed. But what mischief, what evil doing had there been? Why should a perfectly lawful execution be converted into a hurried and secret act of this cursing and bloodthirsty enemy of mankind, this Fawkes of Breauté, 'ever swift to shed blood,' with imprecations about the throat of God? Certainly the impression left on the archdeacon's mind seems to have been that of a deed which, though perhaps lawful, was indecently hasty.

What Paris says in his Chronica Majora[2] is briefer, but it has a new marvel for us, and shows that we are already on treacherous ground. He introduces us to a hermaphrodite. A man has been apprehended who has in his hands, feet and side the five wounds of the crucifixion; he and an accomplice, a person *utriusque sexus, scilicet, Ermofroditus*, confess their offences and are punished by the judgment of the Church. 'Likewise also a certain apostate, who being Christian had turned Jew, a deacon, he too was judicially punished (*judicialiter punitus*); and him Fawkes at once snatched away and caused to be hanged (*quem Falco statim arreptum suspendi fecit*).' The poor deacon who has been already burnt and beheaded is now hanged; this we may pass by, nor will we discuss the question how the old woman who called herself St. Mary became a hermaphrodite, but we again notice that the slaying of the apostate is due to Fawkes, and seems a lawless or at least irregular act. Doubtless the Abbey in which Paris wrote was just the place in which stories discreditable to Fawkes would be readily believed and invented, and Paris himself seems to have cherished a bitter hatred for 'the great enemy and despoiler of St. Alban's[3].' But again we have to ask, whether and why there was anything reprehensible in putting to death this degraded clerk, and, if not, why that evil principle, Fawkes of Breauté, should be invoked to account for what was perfectly natural and right?

[1] [Tovey, Anglia Judaica, p. 11, discreetly desires the reader to observe 'that the Jews are never said to have practic'd it, but at such times as the king was manifestly in great want of money.'—Ed.]

[2] Vol. iii. p. 71.

[3] Dr. Luard's Preface to vol. iii. p. xii.

Another ornate version is given by Thomas Wykes, who, it is believed, wrote near the end of the thirteenth century and in the monastery of Osney, the scene of the council[1]. 'In this council there was presented a deacon who, some time ago, had for the love of a Jewess rejected Christianity, apostatised, and been circumcised according to the Jewish rite. Being convicted of this he was first degraded, then condemned by a secular judgment (*saeculari judicio condemnatus*) and burnt by fire. It was said that this same apostate, in contempt of the Redeemer and of the Catholic faith, had even dared to throw away in an ignoble place (*in loco ignobili*) the Lord's body which had been stolen from a church. A Jew revealed this, and in corroboration of the Christian faith the Lord's body was found unpolluted, uncorrupted, in a fair vessel, prepared for it, as one may well believe, by angel hands. And there was brought into the same council a country fellow (*rusticus*) who had come to such a pitch of madness that, to the despite of the Crucified One, he had crucified himself, asserting that he was the Son of God and the Redeemer of the world. He was immured by the judgment of the Council, and shut up in prison he ended his life, fed on water and hard bread.' This is, I think, the first and only account which states that the deacon was condemned by a lay court, and I believe that it comes from too late a time to be trusted; the legend about the consecrated wafer shows that the story was already being improved by transmission.

There is not much more to be said. Later writers repeat with more or less accuracy what we have already read. Just one new ornament is added, and a pretty ornament too. Having learnt how the *rusticus* (such is the stereotyped description of the miserable man, and it well may mean that he was a villein) crucified himself, and how the deacon assisted at the crucifixion of a Christian boy, we may read in the pages of Holinshed and elsewhere how the council crucified a hermaphrodite, a version of the tale which good Protestants must think very proper and probable[2].

Such being the evidence, were I to venture a guess as to what really happened it would be this:—No one in England doubted for one moment that this deacon ought to be burnt, except, it may be, the deacon himself and his fellow Jews. It is not necessary here to assume that had his offence been mere heresy, his fate would have been the same, though I believe that of this there can be little doubt. But his crime was enormous, he had piled sin on sin. A

[1] Ann. Monast., vol. iv. p. 62. See Dr. Luard's Preface, pp. x-xv.

[2] Holinshed (ed. 1807), vol. ii. p. 251. But the confusion is older; see Knighton, (Twysden's Scriptores), p. 2429: it must, I think, have originated in the clerical blunder of someone who wrote *crucifixus* instead of *immuratus*.

deacon of the Christian Church he had turned Jew, turned Jew for love and for the love of a Jewess. Excommunication would have awaited the king, interdict the nation, if mere heresy had gone unpunished, and England had lately had some sad experience of interdicts. But in such a case as this no ecclesiastical threat would be needed; every one would agree that this self-made Jew must be burnt, that his death was demanded by all laws human and divine. It was the duty of the council to degrade him, to demand that he should be punished, to see that he was punished; but the council could not pronounce upon him any sentence beyond that of degradation. He was degraded then, not inside the church like the manslayer and the thief, but outside the church, before the people, and he was then handed over to the sheriff or his bailiffs. He was at once burnt; most of our witnesses bring out this fact that he was burnt at once and without any further formality. Possibly it was intended that there should be some further formality, some sentence pronounced by a lay tribunal; one of our best witnesses, the canon of Barnwell, seems to say as much, and the story about the indecorous haste of Fawkes points the same way. Possibly, then, Fawkes or his subordinates did act with unexpected promptitude; Fawkes, unless he is maligned, was not much given to waiting for orders. One writer at the end of the century says that the man was condemned by the lay court. I take this to prove that by that time, when the relation between Church and State had undergone some change, it was thought that there ought to be, assumed that there must have been some sentence by a lay tribunal, at least some writ from the king. But whatever was expected and omitted was but a bare formality, the registration by the king's court of a foregone conclusion. By an informality the deacon gained a speedier release from a painful world. Any notion that he would have been saved had he been brought before the king's justices we may dismiss as idle. Those justices, almost to a man, would have been ecclesiastics, and among laymen he would assuredly have fared no better. There was no statute, there may perhaps have been no precedent to the point; such a case is not foreseen in advance, and when it happens it is of course unprecedented; but that a deacon who turns Jew for the love of a Jewess shall be burnt, needed no proof whatever. Bracton, as I think, knew that there had been no judgment of any lay court ('qui cum esset per episcopum degradatus, *statim* fuit igni traditus per manum laicalem'), and he fully approved of what had been done and so far generalized the case as to state for law that an apostate clerk (a layman would have been in no better plight, but Bracton, as it happens, is discussing clerical privileges) is to be delivered to the lay power and burnt.

The fate of the man and woman who were immured, fanatics, lunatics, impostors, enthusiasts, or whatever they were, is really quite as remarkable as the fate of the deacon. The notion that for breach of monastic vows persons were sometimes bricked up in walls was once current and may still be entertained by some who take their Marmion too seriously. Scott indeed sanctioned it not only by verse but by a solemn prose note. Very possibly the main foundation of this notion is some version of the story that has here been before us, for I believe that this is almost all that is to be found about immuration in any English records or chronicles. We see plainly (and this might, I take it, be fully proved from foreign books) that our witnesses do not mean that two persons were suffocated in brick or stone. They were imprisoned for life and fed on bread and water. Doubtless the imprisonment was very close and strait, otherwise we should not have this same *immuratus* from writer after writer when *incarceratus* and *imprisonatus* lay ready to hand, and one writer says that they were enclosed between two walls, not between four; but still they were fed, though water and hard bread were their fare. But what most deserves attention is that they were sentenced to imprisonment, life-long imprisonment, by an ecclesiastical council, and that the sentence was carried out. What is more, they were lay folk. The sentence here was no *judicium sanguinis*, and by pronouncing it the council broke no canon of the Church. But what of the common law? At common law could the ecclesiastical court send a man to prison? This seems to me a vain question; every question about what was 'the common law' is vain that does not specify some date. But suppose that the year 1222 be mentioned, then apparently our answer must be this:—In that year two persons were sent to imprisonment for life by the judgment of an ecclesiastical council, and, in the absence of evidence to the contrary, the natural presumption is that they were imprisoned lawfully.

F. W. Maitland.

[In Tovey's 'Anglia Judaica,' Oxford, 1738, p. 149, there is quoted from a Jewish source what appears to be a confused version of the incident discussed by Mr. Maitland, which is also cited by Tovey from Matthew Paris at p. 85 of his work: it is referred to the year 1260, and used to explain the issue in that year of an ordinance imposing fresh restrictions on the Jews in England. Tovey plainly disbelieved the later story, but he passes over it with a mere indication of contempt.—Ed.]

ON LAND TENURE IN SCOTLAND AND ENGLAND.

III.

IN the two earlier papers I have shown the original identity between the conditions of tenure and occupancy of land in Scotland and England. I have suggested some of the causes through which security of tenure by the humbler classes of occupiers in Scotland disappeared, leaving the right of the holder of a feu-charter the only kind of right known to the law; and I have pointed out how, with some difficulty, the right of leaseholders or tenants having tacks in writing were established under the statute of 1449. I shall now show how the condition of rights so constituted became further defined and crystallised into the system of modern Scotch law.

In the reign of Mary (Queen of Scots) a statute (1555, c. 39) was enacted, upon which is founded the modern procedure for 'removing of tenants.' Previously to this statute, a verbal 'warning' of the tenant, forty days before Whitsunday, had sufficed; after which the lord might recover possession *breri manu*. The consequence of this was, frequently, a free fight on the premises; and if the occupier could succeed, with the help of neighbours, in retaining the possession, the only remedy was an action for assault and 'violent profits[1].' In course of time doubtless, if it were worth while, the offender might be reached by the *ultima ratio* of 'horning and caption' upon a civil debt; but there was, apparently, no direct assistance given by the law to eject the tenant. Arbitrary evictions on a large scale—had they been thought of—would have been clearly impossible. The Act of 1555 laid down minutely the conditions for giving a formal 'warning' personally, on the lands, and in church; and enacted that, on the prescribed formalities being complied with, the tenant should remove at Whitsunday. In default of his doing so, a summary action was provided, resulting in an order of the sheriff or other judge, for removal.

It was some twenty years after the Act last mentioned that Sir Thomas Craig began his practice in the Courts, and about forty years still later that he published his celebrated work 'De Feudis.' During this period, it appears that actions of removing were of frequent occurrence; and, as may be supposed, they were very keenly contested in the Courts. Craig, who had doubtless seen hard cases, is by no means insensible to the moral claim of the occupier.

[1] Craig, ii. 9. 4.

'Seeing that,' he says, 'ex utraque parte species quaedam aequitatis observetur; . . ex parte colonorum, ne nativis sedibus, quas ipsi et parentes eorum diutissime possederant, in quo nati consenuerunt, pellantur;' he determined to examine the matter carefully, and especially the cases in which a defence was competent[1]. But, a little further on, he is obliged as a lawyer—in the case where the landlord has taken the proper steps for a removing—to construe '*aequitas*' as equivalent to '*voluntas domini*[2].'

In short, by the aid of the statute of removing, the proprietor of lands duly infeft, or feudally vested, on a title connected by the proper links (or 'progress') with a Crown grant, could, upon proper warnings, remove all occupiers of the land, not having unexpired tacks, or leases in writing from himself or his predecessors in title.

The process by which, in Scotland, the exclusive dominium of the feudal holders over the entire land of the country was finally perfected, remains yet to be described. It belongs to the scientifically constructed body of statute law above referred to, and was effected by two Acts of a batch made in the usual manner on the 28th of June, 1617. One of these establishes on its present footing, the Land Registry known as the Record of Sasines; and the other settles the law of prescription on a footing which makes the recorded title paramount over claims depending on unrecorded possession or custom. Both these Acts exhibit, in a remarkable degree, the skill in draftsmanship for which, as already observed, this body of statute law is distinguished.

Acts having for their object the publication of the feudal title had been passed at various dates, commencing with the year 1503; but, until the Act of 1617, there was nothing like a complete system of registration enforced by a sanction of nullity. The Act 1617, c. 16, 'Anent the registration of reversions, seasings, and other writs,' proceeds on a recital of 'the great hurt sustained by His Majesty's lieges by the fraudulent dealing of parties who, having alienated their lands, and received great sums of money therefore, yet by their unjust concealing of some private right formerly made by them, render the subsequent alienation done for great sums of money altogether unprofitable,' and enacts that there shall be one public register in which all instruments of seisin, as well as (in rights not capable of seisin) the various instruments or writs affecting what would in England be called the *legal title*, shall be registered within sixty days after the date of the instruments. In default of due registration, the writ is to 'make no faith in judgment by way of action or exception in prejudice of a third party who hath acquired a perfect and lawful right to the

[1] Craig, ii. 9. 2.

[2] Ib. ii. 9. 8.

said lands and heritages.' For the convenience of persons at a distance from the central office, branch offices (called Particular Registers) are established in various places for the respective surrounding districts; and it was optional to the parties to record their writs in the particular register, or in the books kept in the Central Office or General Register. All the registers were placed under the supervision of the officer called the Clerk of the Register and his deputies, and provision is made for the transmission of the books of the particular registers, when filled up, to the Central Office. By an Act of 1858 the registration of the conveyance itself was made to supersede the old form of infeftment or investiture; so that the seisin and publication were effected *uno ictu* by the entry upon the register.

At the time when Sir T. Craig wrote (*circa* 1600), it appears that *prescription* in heritable rights was unknown as a principle of Scotch law. He regards such prescription as an institution peculiar to England. The statutes of 1469 and 1474, which had established a prescription against obligations not followed out within forty years, had been construed, as was doubtless intended, to apply only to moveable debts. Inconveniences must doubtless have arisen under a system which required every title to be traced, through an absolutely perfect progress, to a Crown charter; and at the same time with the inauguration of a complete system of records, means are cautiously introduced for curing defects arising by lapse of time. It did not, however, suit the authors of these Acts, to allow title to be acquired by possession alone, and the innovation is carefully guarded against any operation of this kind.

By the Act 1617, c. 12, on the recital of the prejudice sustained by the loss of title deeds, and the fabrication of deeds to be kept concealed for a time and produced when there might be no means of impeaching them—'whereby His Majesty's lieges are constitute in great uncertainty of their heritable rights, and divers pleas and actions are moved against them, after the expiring of 30 or 40 years; which nevertheless by the civil law and by the laws of all nations are declared void and ineffectual'—it is enacted that persons 'having their rights, their lands, baronies, annual rents and other heritages *by virtue of their heritable infeftments* made to them by His Majesty or others their superiors and authors for the space of forty years continually and together following and insuing the date of their said infeftments and that peaceably,' &c., shall not be liable to be disturbed in their heritable right and property by persons pretending right by virtue of prior infeftments or any other ground except falsehood, *Provided* 'they be able to show and produce a charter of the said lands granted to them or their prede-

cessors by their said superiors and authors preceding the entry of the said forty years possession with the instruments of seisin following thereupon; or where there is no charter extant that they show and produce instruments of seisin, one or more, continued and standing together for the said space of forty years, either proceeding upon retours or upon precepts of *clare constat*.' By a second branch of the same Act, the principle of the Acts of 1469 and 1474 was extended to certain actions grounded on heritable rights. It was enacted 'that all actions competent of the law upon heritable bonds, reversions, contracts, or others whatsoever, either already made or to be made after the date hereof, shall be pursued within the space of forty years after the date of the same; except the said reversions be incorporate within the body of the infeftments used and produced by the possessor of the said lands, for his title of the same, or registered in the Clerk of the Register his books.'

It will be seen how carefully both these Acts of 1617 are framed so that prescription shall operate only in favour of the written and recorded title. According to the judicial construction which has been put on the former Act, an unrecorded infeftment is absolutely null[1]. And it has been authoritatively laid down that actions for directly enforcing a right of property in land cannot be lost by the *negative prescription* (i.e. under the second branch of the latter statute), unless they are excluded by a positive right. 'Because,' as Erskine reasons, 'the negative prescription confers no right on him who pleads it, but barely extinguishes that which is in the adversary; and, consequently, that none but he who hath in himself a full right of property in the lands, can have any interest to plead against his party, that he has lost his by the negative prescription, since by that plea, his adversary's right cannot be transferred to himself[2].' This sort of reasoning does not indeed appear convincing. But the result is in accordance with the manifest and carefully expressed intention of the Act. It is plain that an action for the recovery of land is not *ejusdem generis* with the classes of actions specified as subject to the negative prescription.

The statute of 1617 is the only foundation of prescription in Scotch law relating to rights in land. Prescription, therefore, in Scotland has no operation in setting up or quieting a right of property in land depending on mere possession. The undisturbed occupation for centuries without payment of rent, of land within the territory covered by a charter flowing from the Crown, and on which the grantee and his successors have completed a title

[1] *Young* v. *Smith*, March 11, 1847; 9 D. 937.
[2] Erskine, Inst. iii. 7. 8; *Paul* v. *Reid*, February 18, 1814. F. C.

duly recorded on the register, will be no defence against an action of removing by the person shown by the parchment title to be the owner. But, although the title to property in land may not be acquired by possession however long, the case is different with regard to rights which may be enjoyed as appurtenant to land. So that an owner having the parchment title to a tract of cultivated land may acquire a prescriptive right to common pasture over the adjoining wastes or moorland. Such a prescription cannot, on the other hand, operate effectually in favour of a person whose right to his land depends on possession alone. Being only a tenant at will of the land, he can be in no better position in regard to the pasture or other rights appurtenant to it. Consequently when, by an Act of 1695, powers were given to the Court of Session for dividing common lands between the adjoining proprietors, this was inevitably construed exclusively in favour of the proprietors having parchment titles duly recorded.

Thus the law of what is in Scotland called prescription in heritable rights, operates doubly against the growth of right by custom or possession. Having no recorded seisin, the ancient occupier, such as many of the Highland crofters and cottars, has not and cannot acquire a title to his holding, and the adjoining wastes may be parcelled out to others by proceedings in which, notwithstanding immemorial occupancy, he has no *locus standi*. The tenants thus rigidly excluded by the operation of Scotch law are precisely of the same class with those who, as customary freeholders or copyholders with rights of common over the wastes of the manor, or of the probably more ancient vill, have given variety and stability to the tenures of England, and have been of inestimable value in the preservation of rights of a popular character. That there is now secured to the public the permanent enjoyment, for instance, of Epping Forest, is due to the persistent action in the last generation, of an old man who may be described by an English household word—unintelligible in its subtle meaning to those familiar only with Scotch modes of tenure—as a 'village Hampden.' A village Hampden, in a township where all the inhabitants are tenants at will, is of course inconceivable. And—even as to rights of way—although, in rare cases, such as the important highway through Glen Tilt, the rights of the public have been successfully vindicated; there seems no doubt that many ancient ways from parish to parish are in danger of being lost through the non-existence of any inhabitant in the neighbourhood having any security of tenure in the house or land which he occupies.

I have already alluded to the writ or brieve of inquest which

directed inquiries upon the death of a feudal tenant of land. The proceeding is not in itself of much practical importance, but is interesting as an illustration of the persistence of legal forms. For five centuries—from the time of Robert II, or earlier, until 1847—the style of writ remained absolutely unchanged. An inquest of service appears to have early become usual in all feudal tenures, whether held immediately of the Crown or of inferiors; and a subject superior could not be compelled to grant a renewal of the investiture until the *retour* had been duly made and filed in the Chancery. The procedure in *services* was altered in 1847, when a simple petition was substituted for the brieve and inquest. By the Conveyancing Act of 1874 a *service* was made unnecessary in order to vest in the heir the 'personal right[1]' to land; but the title is not complete, nor can the heir be legally seised of the estate, until a proceeding which is by statute equivalent to the service is carried out. Something of the kind is indeed required to maintain the perfection of the Scotch system of land registers. In England the brieve of inquest does not appear to have been used in the case of inferior tenures; but in the case of tenants *in capite* of the Crown, an analogous proceeding known as the *inquisitio post mortem* was employed up to the time of the Commonwealth. Under statutes of the reign of Henry VIII, these inquisitions had come within the jurisdiction of the Court of Wards and Liveries; and this Court, with the business pertaining to it, was extinguished during the Commonwealth, in 1645, by the same Act (confirmed after the Restoration by 12 Ch. II. c. 20) which abolished military tenures.

The distinctive incidents of the military tenures which were abolished in England in 1645[2], survived in Scotland for a century longer; and were not abolished until after the Jacobite rising in 1745. They were at length put an end to by the Act 20 Geo. II. c. 50. But the peculiar features of feudal tenure relating to the constitution and transmission of rights in land remained unaffected. The Act of 1874, already referred to, removed many practical inconveniences, such as the right of the superior's agent to intervene in drawing the necessary documents for the completion of title in

[1] I. e. the *jus ad rem* of the person entitled, but whose right had not become feudally completed.

[2] It is curious that Lord Stair, who published the first edition of his work in 1681, speaks of knight-service in England as an existing institution (ii. 4. 33). I have already referred to Lord Stair's theory ascribing the origin of instruments of sasine to James I. on his return (1424) from captivity in England. He has a similar theory for the origin of the use in Scotland of the brieves from Chancery (iv. 1. 2). Lord Stair cannot, indeed, be blamed for not knowing the results of later antiquarian research; nor, as a Scotch lawyer, was he bound to know the law of England. But the attitude which he assumes as a historical and universal jurist provokes criticism as to his pretensions outside the domain of technical Scotch law.

cases of succession. But the essential features of Scotch title, to which attention has been directed in this essay, remain intact.

Broadly speaking, the contrast between the English and Scotch laws of title consists in this. In Scotland title depends upon an actual grant or charter from the Crown and a complete 'progress' or series of documents duly recorded, connecting the proprietor with the grantee under the Crown charter. In England title is ascribed to the seisin of the proprietor or a predecessor, of which possession is *primâ facie* evidence. In effect title depends on *possession* fortified by *prescription*. The title depending on possession, and not on the express terms of a grant in writing, the modes of tenure and of inheritance by descent are dependent on custom to an extent unknown in Scotland. Moreover, humble tenures which have never been deemed worthy of a grant or record in writing have by long custom acquired in England a *status* and recognition by law, which, under the hard and fast rules of Scotch law, is impossible. In Scotland the same tenures have long ago lapsed into mere tenancies at will, unless in the case where the holder has taken a lease, in which case he is entitled to hold for the term and upon the conditions of the lease, and no otherwise. Consequently rights which have been enjoyed, from time immemorial, as appurtenant to the humbler tenements have long ceased to have any legal validity. Where the tenants enjoying them are tenants at will, *cadit quaestio*. Where they are lessees, the conditions of the lease would be dictated, not by custom, but by the convenience of the grantor.

It will have been seen that in this comparison of Scotch and English tenures I have not left out of view what is called the 'crofter question' in the Highlands and Islands. It will be understood that an historical sketch of Scotch law has little direct bearing on any questions of custom or rights of occupancy which may at one time be supposed to have existed in these regions. I have shown that the humbler tenures connected with the usages of the ancient vill and of the old manors, had practically disappeared in Scotland in the early part of the fifteenth century. In the legal system which has supervened there is no place for any rights belonging to what has been called the highland township. Legislation for such a purpose was not within the scope of the framers of our Scotch Acts, who regarded the inhabitants of the 'Isles and Highlands' as an unprofitable and savage population, who could only be kept from external mischief by from time to time exacting from their chiefs the obligation of showing their infeftments and giving security for the good behaviour of their people[1]. I have

[1] Act Parl. 1597, c. 262.

in the preceding sketch of the Scotch law of tenure endeavoured to state with clearness and some particularity the legal position which, in its bearing on this question, has been often stated vaguely. With regard to the expediency of specific proposals for legislation I can speak with no claim to special knowledge of the districts affected. I am inclined to suspect that the strength of customary rights enjoyed by Highland occupiers (say) two hundred years ago, has been on the one side a good deal exaggerated. I doubt whether the individuals of the shadowy body called a 'clan' had, even morally speaking, any interest or share, properly so-called, in the land; or whether there were any definite limits, except those set by what political economists used to call the 'niggardliness of nature,' to the rent and services which a highland chieftain, or the tacksmen under him, might have screwed out of the actual cultivators. On the other hand, to describe the actual occupiers, as the Duke of Argyll has done, as 'sub-tenants of tacksmen'—besides begging the question of moral right—is misleading by conveying the notion of a *contract* of sub-tenancy which, in reality, did not exist. It was at all events the interest of the chief that the land should raise men; and his power over his people was, to compare small things with great, not more independent of custom and opinion than the power over their subjects of those monarchs whom we are accustomed to term autocrats. It was only after the 'reign of law' had become established in the Highlands—and the process was not complete until the middle of the last century—that the chief who was feudally infeft, under a charter, of the land of his little territory, became vested with the power, in aid of his authority over his vassals, of calling upon the whole force of the organized community of the State. Nor did he become aware of—at all events he did not make large use of—this power, until towards the end of last, or early in the present, century. It was then that the Highlands were required as the fitting arena for a demonstration on a large scale of the newly revealed laws of political economy. To call it an *experiment*, as Professor Blackie has done, is a misapplication of language. The principles of the science had been proved deductively, and experiment was superfluous.

In order to be sure of doing justice to the authors of the proceedings here referred to, of which those on the largest scale are known as 'The Sutherland Clearings,' I shall indicate their nature by quoting the language of apologists. The Duke of Argyll[1] says:—

'During the whole of late autumn, the whole of winter, and the whole of spring, in fact the whole year from October to June, there

[1] Nineteenth Century, November, 1884, p. 695.

was complete and absolute waste of all the higher pastures, while even during the shieling months a mere fraction of the natural produce of the country was put to human use. It is for this reason that I have repeatedly represented, and do now again represent, the introduction of sheep-farming into the Highlands as equivalent to the reclamation from pure loss and waste of somewhere about nine-tenths of all the mountain area. It is true that the poor natives had a few sheep before. But they were so ignorant of the nature of the animal, and had such inferior breeds, that they imagined they could not live upon the mountains during winter, and were in the habit of folding them during that season. When it was discovered for the first time, about 1793, that the modern breeds of sheep could live and thrive on the Highland mountains all the year round, a great portion of the country was as much redeemed and reclaimed for the use of men, as if it had been lifted from the bottom of the sea.'

And further on[1], he says:—

'I have not yet specified one insuperable difficulty which lay in the way of at once converting the old labouring sub-tenants of the Highlands into comfortable farmers, where the greater part of the surface of the country consists of high mountains. These high mountains, it is true, are sometimes buttressed and surrounded by lower hills, as they are also moated and ditched round by some narrow glens where there were a few flat and marshy meadows. It was upon these lower hills that the old 'clachans' were generally situated, and that the natives fed their small stock of inferior cattle and conducted their still more miserable husbandry. But if the great mountain surfaces were to be utilized at all, the sheep upon them required to have their lower slopes and hills to graze upon in the winter months. Without them, therefore, or at least some large part of them, the whole vast area of the upper pastures could not be used at all. So true is this that I know recent cases in which proprietors have endeavoured in vain to secure a separation of the lower hills from the adjacent mountains, in order to convert these lower hills into small farms and in order to restrict the larger sheep-farmer to the higher mountains exclusively. But it has been repeatedly found that in many cases this could not be effected except at the total sacrifice of the mountains, which means the total sacrifice of by far the larger part of the whole area of those regions which are food-producing.'

Mr. Patrick Sellar in his vindicatory statement[2], after stating that, in 1810, he had the honour to be engaged by the Marquess and Marchioness of Stafford to be factor of the Earldom of Sutherland, i.e. (*inter alia*) to carry legally into effect such arrangements as should be directed by their commissioner, acting under their instructions, continues:—'This gentleman, in exploring the estate,

[1] Nineteenth Century, November, 1884, p. 697.
[2] The Sutherland Evictions of 1814. By Thomas Sellar. Longmans, 1883, p. 48.

found it to consist of a huge mountainous tract of wet peat bog, interspersed with narrow strips of low haugh, subject to mildew, and skirted round by shores conterminous to fishing ground, not perhaps much less valuable than the estate itself. He found the country very much possessed under middlemen; of whom one, two, and in some cases three, intervened betwixt the landlord and tenant; and he came to the resolution of dispossessing the middlemen, removing the people nearer to the shore, and putting the mountains under Cheviot sheep—a resolution which it may be believed made my duty no sinecure.'

Satisfied as to the utility of the policy so resolved upon, the improving proprietors had no hesitation in using the powers allowed by law for carrying it out. 'Law is the command of a Sovereign' was the maxim laid down in Scotch Principles of Law[1] a hundred years before English students were vexed by Austin. The powers of the law were accordingly requisitioned, and put in force with the aid of agents who thoroughly understood their business. That such a use of the powers of the law was, morally speaking, a mistake and surprise, is now very generally recognised. It was much as if a young man coming to a banker with a personal introduction from a Rothschild, should make use of it by drawing a cheque in six figures. The wonder now is that society should not have perceived and resented the fact that a few individuals had, deliberately to further their own ends, made drafts upon the organized force of the community to an extent altogether disproportionate to their interest as citizens or share as proprietors in the common wealth. Equally surprising now seems the fact—which a few years ago seemed only natural—that highland property attained a fancy value based on the assumption that the owner of an estate of, it may be, several parishes, might remove at his arbitrary will every human being dwelling on it. Such a power had its attractions for the sportsman and the philanthropist, who have before now competed to raise the market value. Such fancy values have already collapsed on the discovery that it is possible by the extreme use of legal rights to put too great a strain on the 'habit of obedience' of a singularly law-abiding population. The Crofter Commission in their Report, indeed, say that the time of arbitrary evictions is past. Of this the inhabitants in some districts are by no means assured. And any certainty as to the conclusion of the Commissioners is contradicted by notorious facts; and especially by the proceedings of Mr. Winans, the American humourist, who claimed the right as lessee to require the owner to remove tenants for the better enjoyment of his land as a deer-

[1] Erskine's Principles (1754).

forest. If Mr. Winans had bought the land instead of taking a lease, there could hardly be a doubt that evictions for sporting purposes would have taken place. The apprehension created by a case of this kind is not measured by the area actually affected. Nor is the bitterness of feeling left by the old evictions likely to be assuaged by the fact that they were conducted upon sound principles of political economy; or that men were made to give way to sheep before sheep had to make way for deer.

It is not, however, my present object to prove—what indeed amply appears otherwise—that the state of land tenure in the districts reported on by Lord Napier's Commission calls for the intervention of the legislature: it is the more limited aim of this essay, so far as bearing on the subject, to point out that this state of things has been in great measure brought about by the peculiar features of Scotch law; which have perpetuated conditions of tenure belonging to the period of Scotch history when occupancy rights were weakest. I have suggested by way of contrast some of the causes which have in England placed the tenure of land on a more popular basis; and, in conclusion, I may express the hope that any well-considered measure of legislation for the improvement of the condition of the humbler tenancies in the districts in question may not be obstructed by the propensity of our Imperial Parliament—too frequent in matters which are imperfectly understood in England—to bind upon others burdens which neither we in England, nor our English forefathers, were able to bear.

R. CAMPBELL.

THE EXTRADITION OF POLITICAL OFFENDERS.

THE subject of the extradition of political offenders has, during the last few years, attracted considerable attention, both at home and abroad. I do not propose to discuss the question, whether it is the duty of a State to surrender fugitives from justice, without having entered into a compact to that effect. In England the doctrine that there is no such duty has prevailed in modern times, and it seems further to be well established that the extradition of criminals to foreign States cannot be granted, except under the sanction of an Act of Parliament [1]. Thus a treaty with a foreign Government would not, alone, enable the British authorities to surrender a fugitive to that Government. Accordingly whenever, before 1870, the British Government entered into an extradition treaty, an Act of Parliament had to be passed to give effect to it. Of the treaties antecedent to 1870 only one is now in force, that of 1842, between Great Britain and the United States. The only crimes included in it are murder, assault with intent to commit murder, piracy, arson, robbery, forgery, and the utterance of forged paper. The treaty contains no express provision with reference to offences of a political nature [2].

In 1870 an Act of Parliament (33 & 34 Vict. c. 52) was passed which regulates all our treaties concluded since then [3]. This Act dispenses with the necessity of having each treaty confirmed by a special Act, an Order in Council being now sufficient to give effect to any arrangement made with a foreign State under the powers conferred by it. The Act requires that certain formalities shall be observed before a fugitive is given up. The first schedule contains a list of extradition crimes, i. e. crimes which may be included in treaties made under its provisions, and this list has been extended

[1] The reason is that by the municipal law of England there is no authority or machinery for arresting or detaining a person charged with the commission of a crime unless our courts have jurisdiction, or for surrendering an accused person to a foreign government. There are some dicta to the contrary, but the modern authorities have placed the matter beyond doubt. See Forsyth's Cases and Opinions on Constitutional Law, pp. 341, 369, 370; Mr. Edward Clarke's Treatise on Extradition, Chapters ii. and v., and the opinions expressed by the law lords with regard to the case of the Creole, Hansard, 3rd Series, vol. lx. pp. 27–30, 317–327. In Besset's case, 6 Q. B. 481, Lord Denman said: 'Neither we nor the gaoler have any power but such as the statute gives.'

[2] Article 10 of the Ashburton treaty, Hertslet's Collection of Treaties, vol. vi. p. 859; Kirchner, 'L'Extradition,' p. 60. The latter work, compiled by Mr. F. J. Kirchner, of the Criminal Investigation Department, contains the full text of all the extradition treaties between civilized nations which were in force at the time of its publication (1883).

[3] By the 27th section of this Act, the Act giving effect to the treaty with the United States is repealed. The Act of 1870 is made to apply to that treaty, 'with the exception of anything contained in it which is inconsistent with' the latter.

by an amending Act, pa sed in 1873 (36 & 37 Viet. c. 60), so that it now embraces most of the offences indictable under the law of this country.

The Act of 1870 carefully guards against the extradition of political offenders. The third clause, so far as it is necessary to quote it, is as follows:

'(1) A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate or the court before whom he is brought on *habeas corpus*, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character.'

The formalities prescribed by the Act are admirably adapted to ensure that the object of this clause shall be carried out, and that a fugitive who has been surrendered shall, if acquitted, be allowed to return to British territory.

It is obviously most important that we should have some clue to the meaning of the term 'political offences' in this Act; but neither in the Act itself, nor in any of the treaties, is an attempt made to define or in any way limit the term. Although a discussion in Parliament cannot be referred to for the purpose of explaining a statutory enactment, it is interesting to see what took place when the measure was passed. There was no debate upon it in either House. The Attorney-General (Sir Robert Collier) in moving the second reading of the bill in the House of Commons said that 'they had found it more difficult to define a political offence than to define the Ulster Convention, and they had finally given up the attempt and had left the matter to the Courts[1].' It is not easy to see why the Courts are in a better position to define a political offence than were the law officers of the Crown. The Courts can only declare what the actual state of the law is; they cannot, like the Legislature, make it what it ought to be. It is possible, therefore, that their decision would not be in harmony with the wishes of the nation. Moreover, the question of the surrender of a fugitive criminal could be left to the British Courts only in the event of a foreign Government calling upon England for his extradition. In the converse case there is nothing in our treaties to prevent another power from interpreting the expression 'political offences' in the widest possible manner.

Indeed, a wide interpretation of the expression is to a great extent justified by the fact that it is not a technical or legal but a popular term, which has been applied to a variety of offences[2]. It may be said

[1] Hansard, 3rd Series, vol. ccii, p. 302.

[2] 'Il est très-vrai de dire que, dans le langage scientifique, le sens de ce terme n'est

that those offences are popularly called political, which are committed with a political object[1]. In this sense a crime is political, the object of which is (1) to bring about or further a change in the form of the government of a State or in the composition of the Government; or (2) to influence the action or legislation of the Government; or (3) to bring the Government into disrepute. This definition embraces such different acts as the assassination of the Emperor Alexander, the exploits of Lord George Gordon in 1780, the Hungarian rebellion in 1849, or the seditious preaching of Dr. Sacheverell. The test being the motive, the murder of President Garfield was not a political crime, if, as is probable, Guiteau's *object* was to gratify a personal feeling of ill-will, although the *consequence* was a change in the composition of the Government[2].

The objection can, of course, be taken that this broad definition is wrong, because many of the crimes which it covers are really ordinary crimes, which ought not to be confounded with pure political offences. For instance, it would make such an outrage as the murder of Lord Frederick Cavendish and Mr. Burke a political crime. A conspiracy to blow up buildings with dynamite, regardless of the sacrifice of innocent lives that may follow, would be a political crime, although unconnected with military operations, if the object of the conspirators was to coerce the Government into granting the demands of the party to which they belonged. 'There is,' said the late Earl Cairns in the House of Commons in 1866, when he was Attorney-General, 'some confusion of ideas between

pas fixé. Mais si tel jurisconsulte entend par là toutes les infractions qui peuvent produire des conséquences politiques, tel autre celles qui sont inspirées par une pensée politique, tel autre encore celles dont l'objet direct est le renversement de l'ordre politique, s'il en est qui exigent que l'infraction ne lèse en même temps aucun intérêt privé, il n'en resulte qu'une chose, c'est la nécessité évidente d'une définition légale, dès que le législateur se sert de ce terme.' (*Les infractions politiques*, by Professor Albéric Rolin—Revue de Droit International, vol. 15, p. 430.) The following passage from M. Renault's Report to the Institute of International Law is also in point: 'Dans la pratique, pour éviter les difficultés, on a entendu l'exception de la manière la plus large, par cela seul qu'un fait se rattachait par un lien quelconque à une entreprise politique, ou était inspiré par une pensée politique, l'extradition a été refusée ; et ainsi des individus accusés des faits les plus odieux, d'assassinats, d'incendies, ont bénéficiés de l'asile assuré par la civilisation moderne aux réfugiés politiques.' (*Annuaire de l'Institut de Droit International*, 1881, p. 83.)

[1] In 1866 the question of the protection of political refugees was raised in the House of Commons during the discussion of a bill to legalize the amendment of the extradition treaty with France. The late Sir Francis Goldsmid proposed the insertion of a clause which would actually have made the surrender of a fugitive criminal depend on the motive with which his crime had been committed. The clause ran thus: 'Nothing in this Act, nor in any previous Act relating to treaties of extradition, shall be construed to authorize the extradition of any person, in whose case there shall be reasonable grounds for belief that his offence (if any) had for its motive or purpose the promotion or prevention of any political object.' It was pointed out that such an enactment would forbid the surrender of political assassins like Orsini or Wilkes, and the clause was withdrawn. (Hansard, 3rd Series, vol. clxxxiv, pp. 2107–2124.)

[2] This murder must, however, be included among the 'infractions qui peuvent produire des conséquences politiques.' According to M. Rolin some jurists would, therefore, call it a political crime.

political offences and murder committed from political motives[1].' An opinion similar to that of Lord Cairns was, in the Session of 1883, expressed by Sir William Harcourt who, in answer to a question in Parliament, said with reference to 'conspiracies to murder, to burn and destroy':—'I hope that I may be allowed to say that there can be no more dangerous or mischievous fallacy than to describe such conspiracies as political offences. Whatever may be the motives of those who commit them, these are crimes of the most nefarious character, and those who participate in them should be treated as ordinary criminals, both in regard to their detection and punishment[2].' It may be possible to frame a more logical definition of political offences than that which I have attempted to make, so as to exclude the species of crimes mentioned by Sir William Harcourt. But the remarks of Lord Cairns and Sir William Harcourt are evidence in favour of its correctness; for they would never have been made unless these crimes were commonly called political.

If we accept the popular conception of political offences, they can be roughly divided into three classes. One consists of acts done in furtherance of insurrection or political tumult which would not be unlawful if committed against belligerents. A second class consists of offences which are made criminal because their object is political, and which have no ordinary criminal element. The third class includes acts committed with a political object which, apart from such object, have an ordinary criminal element[3]. Offences that belong to the first or second class may not inaptly be called 'pure political crimes.' Those which must be placed in the third class are 'mixed crimes.' French jurists would call them 'crimes de droit commun connexes à des faits politiques.'

The first of these three classes of political offences scarcely needs to be discussed when the question is one of extradition. It is a settled principle of International Law that, in the case of actual civil war, foreign States are entitled to treat the contending parties

[1] Hansard, 3rd Series, vol. clxxxiv, p. 2121.

[2] Hansard, 3rd Series, vol. cclxxviii, p. 59.

[3] The 13th and 14th of the resolutions relating to extradition, adopted at Oxford by the Institute of International Law, embody a classification substantially the same. They are as follows:—

13. L'extradition ne doit pas avoir lieu pour faits politiques.

14. Le gouvernement requis apprécie souverainement, d'après les circonstances, si le fait à raison duquel l'extradition est reclamée a ou non un caractère politique. Dans cette appréciation il doit s'inspirer des deux idées suivantes.

(1) Les faits qui réunissent tous les caractères de crimes de droit commun (assassinats, incendies, vols) ne doivent pas être exceptés de l'extradition à raison seulement de l'intention politique de leurs auteurs.

(2) Pour apprécier les faits commis au cours d'une rébellion politique, d'une insurrection ou d'une guerre civile, il faut se demander s'ils seraient ou non excusés par les usages de la guerre.

(*Annuaire de l'Institut de Droit International*, 1881, p. 128.)

like States at war with one another. Further, it is their duty to abstain from intervention, unless their own interests are seriously affected, or their position is modified by treaty engagements, or intervention is urgently required for the sake of humanity. It follows that in the treatment of fugitive insurgents, a foreign country should refuse to admit that they have committed any crime for which their surrender can be demanded. The reasons for maintaining this rule are thus stated in the Report of the Royal Commission of 1878 on Extradition: 'One nation can scarcely be said to have such an interest in the particular form of government, or in the particular ruling dynasty of another, as that it should be called upon to make common cause with it against its political offenders, and, however odious the character of the rebel who disturbs the peace of his own country and gives rise to bloodshed and disorder from interested motives, or reckless disregard of the miseries attendant on civil discord, yet both from history and our own experience we know that there are exceptional instances in which resistance to usurpation or tyranny may be inspired by the noblest motives, and in which, though unsuccessful, it may escape condemnation and even command sympathy[1].'

The foregoing remarks deal with the case of refugees who have been engaged in actual civil war; but what has been said of them applies equally to those who, without having commenced formal hostilities, have done acts in furtherance of insurrection that would be legitimate as between belligerents. There is no reason why, in the matter of extradition, a foreign State should deem an abortive attempt to kindle insurrection more criminal than a successful one, or a conspiracy to bring about a revolution more culpable than flagrant revolt.

The second class consists of a number of offences, which have the common quality of being criminal only on account of their political object. To repair to either House of Parliament, accompanied by more than ten persons, for the purpose of presenting petitions, or to hold meetings within a mile of Westminster Hall for the purpose of preparing petitions to Parliament, are examples of acts unlawful according to English law, which fall under this head. The delivery of seditious speeches is also in the same category. One characteristic of this class is that the crimes of which it is composed are not acts of violence; for criminal acts of violence either must be lawful if committed between belligerents, or otherwise they transgress the ordinary criminal law of all civilized communities. There is no reason why this class should be dealt with otherwise than in the past.

[1] Report of the Royal Commission on Extradition, 1878, § 3.

Of the remaining class of political offences, namely those which are ordinary crimes, independently of the political motive, recent events afford numerous examples. Those which are most likely to occur are attacks upon official personages, or the destruction of and attempts to destroy property, in order to intimidate the Government. In 1868 a Select Committee of the House of Commons recommended that assassination and attempted assassination should not be included in the exception of political crimes[1]. In cases of deliberate murder it is indeed difficult to conceive why the station in life of the victim should make a difference in the treatment of the escaped assassin by a foreign State. There are some people with advanced views who seem to consider all who have some authority in their State the legitimate prey of any one that wishes to rid the world of them. But the sober-minded portion of mankind cannot lightly assent to the proposition that persons in official positions are, on account of their rank, to be deprived of those safeguards which their fellow-men enjoy whose condition in life is humbler. They stand more in need of protection, for they run greater risks than others of being slain for the purpose of intimidation. (Terrorism, for instance, was the object of the murder of Mr. Burke in the Phœnix Park; none of his assailants had a private reason for killing him.) If those who wish to change the government or the laws of their country resort to open warfare, foreign States should shelter them without judging of the righteousness of their case, as long as they do not abuse this protection. But if they endeavour to attain their ends by assassination, they are not entitled to be treated differently from other murderers.

The arguments in favour of surrendering murderers apply equally to the case of accessories before the fact to murder and of those who conspire to murder. The accessory before the fact is morally as guilty as the actual assassin. Often, indeed, his guilt is greater, as he may be the real author of the crime and the other merely his tool, perhaps forced to act for the sake of saving his own life. To except accessories and conspirators from extradition would give encouragement to the most serious crimes. For the accessory or conspirator can usually escape to a foreign country. Suspicion is not likely to fall immediately upon him, as he is not present at the commission of the crime, if an overt act has taken place; and in these days of railways and steamers he can probably escape to some place beyond the jurisdiction of the State whose Courts have power to try him.

The dynamite explosions that have occurred in this country and

[1] Report of the Select Committee on Extradition, Resolution 5.

on the Continent suggest the advisability of also providing for the extradition of the perpetrators of such outrages, and of those who engage in conspiracies to effect them. If any one feloniously causes an explosion whereby life is lost, his offence is clearly murder, and he can be brought to justice for it, without reference to the means by which the crime was committed. If no loss of life occurs, but the object is to destroy life, the act of causing the explosion may be an attempt to commit murder. And if, without any intention on the part of the criminal to cause loss of life to any one, the explosion has resulted in injury to a human being, the offence of doing grievous bodily harm or unlawful wounding has been committed[1]. But, as the occurrences in Whitehall and Victoria Station show, an explosion may happen without being followed by loss of life or personal injury, although the crime has brought numbers of peaceful citizens into danger to life and limb. It has been said that these explosions are in the nature of acts of warfare. Attempts are made to destroy buildings and railways in the heart of an unfortified town, when their existence could not possibly aid in military operations. Insurrection is not attempted, and seemingly not contemplated. The lives that are imperilled are almost entirely those of women and children, and men who follow civil occupations. It is absurd, under these circumstances, to talk of acts of warfare.

With regard to offences committed in the course of insurrections or political tumults, exceeding that which is lawful between belligerents, there is a great diversity of opinion.

'Generally speaking,' say the Royal Commission of 1878, 'we would decline to recognise the suggestion of a political motive as a ground on which a magistrate or judge should refuse a demand for the surrender of a person accused of what (in the absence of such motive) would be an ordinary crime, unless the Act, to which a political character was sought to be ascribed, occurred during a time of civil war or open insurrection.'

M. Bernard's comment, in his Traité de l'Extradition, on this recommendation is that it leads straight to barbarism (mène tout droit à la barbarie). The Foreign Affairs Committee of the American House of Representatives, in a report adopted in February, 1884, thus state their views:—

'The people of the United States will never consent to the government surrendering to a foreign Power a participant in an even unsuccessful political revolution, rebellion or civil commotion, who might be charged by his government with the overthrow of his country's institutions, or with crimes committed in promotion of

[1] Wounding or doing grievous bodily harm is only included in four of our treaties, viz., those with France, Spain, Luxemburg, and Salvador. (*London Gazette*, May 21st, 18 8; November 27th, 1878; March 4th, 1881; January 2nd, 1883. Kirchner, 88, 120, 110, 120.)

such revolt, which should then have passed beyond the condition of an ordinary violation of law.'

It seems to me that the authors of both these reports go too far. If a band of insurgents were openly carrying on hostilities in one part of the realm, and one of their number, thinking that it would be to their advantage if the sovereign or a member of the government were killed, assassinated him in a place remote from the seat of the revolt, the crime would be committed 'during a time of insurrection' and 'in promotion of revolt.' The circumstances of the murder of President Lincoln by Wilkes resemble those of the case now suggested. Yet if Wilkes, instead of being killed by his pursuers, had escaped to Canada, would a refusal to surrender him have been desirable?

The utmost that should be done is to exempt from extradition offences committed with a political motive in the actual course of a rebellion or political tumult[1]. It may be argued in favour of the exemption, that in hostilities carried on by the regular forces of civilised States acts are often committed with impunity which cannot be justified by the rules of warfare. How much more difficult must it be to prevent them in a popular rising, when the worst passions of mankind are aroused, and the party contending against the Government *de jure* often consists of an unorganized body of men. The exemption should also be strictly limited to tumults of a true political character. If a gang of thieves brought about a riot to facilitate their operations, their acts would not be political crimes. Nor would a band of brigands associated together for plunder become political offenders because, while committing depredations, they carried on a species of war against the Government.

From a practical point of view there are doubtless some grave objections to the surrender of persons accused of political crimes. It is more difficult to ensure a fair trial in political than in ordinary cases. As the danger from the former to the constitution of society is greater, so also there naturally often is an animus against the accused on the part of the representatives of the Government, who are the prosecutors, and on the part of the judges whose training necessarily inclines them to take a hostile view of acts peculiarly dangerous to the established order of things in the State. And when the offence is one of conspiracy or being accessory to a serious crime, the danger of a miscarriage of justice is increased by the fact that the evidence is often indirect, or that of spies or informers. The State which is asked to surrender a fugitive can,

[1] This does not apply to every offence happening in the course of a rebellion. An insurgent who commits a rape or a robbery does not act with a political motive.

however, insist on the fulfilment of certain conditions before it complies with the demand[1]. It ought to retain the right of requiring satisfactory proof that there are grounds for bringing the accused to justice. The recent Extradition Treaty between Russia and Prussia apparently provides for the surrender of subjects of the demanding State, accused of crimes of violence, without any proof of their guilt[2]. The English Extradition Act requires such evidence against the accused as would justify his committal for trial, if the alleged offence had taken place in England. It is safe to predict that no British Parliament would sanction a treaty by which anything less was required.

A State may also refuse a demand based on evidence which by its own laws is inadmissible, such as (in some countries) the evidence of accomplices[3]. It may require a guarantee that the prisoner shall not be tried by a special Court, or under a special procedure created for a particular purpose, if it think that the intended court or procedure will not insure a fair trial[4]. Moreover a Government to whom a fugitive has been surrendered would in its own interest have a strong motive for acting honourably. For if it did not scrupulously carry out the conditions on which extradition was granted, this would be a sufficient reason for rejecting a subsequent demand of a similar kind.

As I have already had occasion to remark, there is no explanation of the meaning of the term 'political offences' in our extradition treaties. The British Courts will have no guidance if they should be called on to settle this point, and foreign States, which do not usually leave these matters to their legal tribunals, can interpret the treaties in the manner that suits them best. What effect, for instance, ought to be given to the following clause, contained in our treaties of 1876 with France and Belgium:—'No accused or convicted person shall be surrendered, if the offence in respect of which his surrender is demanded shall be deemed by the party upon which it (!) is made to be a political offence, or to be *an act*

[1] The Extradition Act provides that the Crown may, by the Order in Council giving effect to a treaty or by any subsequent order, render the operation of the treaty subject to such conditions, exceptions, and qualifications as may be deemed expedient.

[2] Deutscher Reichs-Anzeiger, January 23rd, 1885.

[3] The police magistrate before whom a fugitive is brought must hear the case in the same manner as if the offence were committed in England, and, therefore, according to the English law of evidence. Depositions and statements on oath are, however, admissible. It would certainly be more satisfactory, in some crimes connected with political objects, to have oral testimony. It might be left to the discretion of the Secretary of State or police magistrate to require such testimony if it seemed to him to be desirable.

[4] The Institute of International Law adopted the following resolution at Oxford:—

'En tout cas l'extradition pour crime ayant tout à la fois le caractère de crime politique et de droit commun ne devra être accordée que si l'Etat requérant donne l'assurance que l'extradé ne sera pas jugé par des tribunaux d'exception.' (*Annuaire de l'Institut de Droit International*, 1881, p. 129.)

connected with (connexe à) such an offence'? If a French or Belgian statesman were assassinated for the promotion of a treasonable design, might our Courts not feel themselves obliged to decide, however unwillingly, that this was an act connected with a political offence? Such a ruling would be more consistent than any other with the language of the clause and, if there were a doubt, a construction favourable to the accused would have to be adopted. Again, could we feel surprised if under similar circumstances the French Government came to a similar conclusion?

A brief notice of the difficulties which arose in Belgium in a case of this kind will, however, be more useful than mere speculation. A Belgian law forbade the surrender of any person accused of a crime connected with a political offence (fait connexe à un délit politique)[1]. In 1854 an infernal machine was placed on the railway between Lille and Calais, for the purpose of blowing up a train in which the Emperor Napoleon was travelling. Two brothers named Jacquin who were implicated in the crime escaped to Belgium, and their extradition was demanded by France. The Belgian Courts were divided in opinion. The Cour de Cassation and the Court of Liége held that the prisoners could be surrendered, while the Court of Brussels came to a contrary conclusion. There was great excitement throughout the country, and finally the French Government withdrew its demand, and the brothers were allowed to leave Belgium by a frontier chosen by themselves. In consequence of this unsatisfactory end of the matter, the Belgian Ministry prevailed on the Chamber to pass a law enacting that the assassination of the ruler of a foreign State or of a member of his family should not be deemed a political offence. (Ne sera pas réputé délit politique, ni fait connexe à un semblable délit, l'attentat contre la personne du chef d'un gouvernement étranger ou contre celle des membres de sa famille, lorsque cet attentat constitue le fait soit de meurtre, soit d'assassinat, soit d'empoisonnement[2].) An explanatory clause, in the terms of this law, has been inserted in most of the French and Belgian treaties, immediately after the clause prohibiting the surrender of political offenders[3]. There is a

[1] Bulletin officiel des lois et arrêtés royaux de la Belgique, 1833, p. 590, No. 1195.

[2] Recueil des lois et arrêtés royaux de Belgique, 1856, p. 91; Billot, Traité de l'extradition, pp. 113–117.

[3] It is to be found in the treaty concluded in 1882 between the United States and Belgium. (Moniteur Belge, 28th November, 1882; Kirchner, 1036.) There are other American treaties in which the exemption of political offenders from extradition does not seem to be unqualified. The treaty of 1861, between the United States and Mexico, provides that there shall be no surrender for offences of a 'purely political kind.' (Kirchner, 156.) Interpreted literally, purely political offences cannot include acts that contain an ordinary criminal element. The treaty of 1870, between the United States and Peru, contains a clause similar to that of the Mexican treaty. (Samwer et Hopf, Recueil, Second Series, vol. i. p. 108.)

distinct advantage in having such a clause, so as to settle the doubt whether the murder of the ruler of a State is a political crime. But political offences are not necessarily limited to the murder of a member of a royal family, and a more general statement of the principle which regulates the surrender of political offenders is desirable.

The conclusion to which I have been led is, repeated briefly, that the fact of a crime directed against or dangerous to human life having been committed from a political motive is not in itself a sufficient reason for protecting the criminal. The principle herein embodied could be easily expressed, without an elaborate attempt to frame a positive definition of political offences, in the following or similar words: 'No fugitive shall be surrendered for a political offence,' qualified by an explanatory clause: 'An offence directed against, or endangering, human life, shall not be deemed to be a political offence, merely because it has been committed from a political motive, (with the addition, if desired), unless it has been committed in the actual course of an insurrection or political disturbance[1].' This definition seems to me to make not only murder and attempted murder, but also conspiracies to murder and, when it is desirable, malicious explosions and conspiracies to cause them *prima facie* non-political offences. On the whole it ought to work satisfactorily. For the principle on which it is based does not countenance the destructive forces which are continually fighting by secret and dishonourable means against the institutions on which the organisation of the State depends. Yet, on the other hand, it does not interfere with those who, in striving honestly to alter the constitution or laws of their country, resort to force.

E. L. DE HART.

[1] According to the new extradition treaty between Russia and Prussia, the fact that the crimes included therein 'are committed with a political aim, shall in no case serve as the basis for a refusal to surrender the culprits.' (La circonstance que le crime ou délit à raison duquel l'extradition est demandée a été commis dans un but politique ne pourra en aucun cas servir de cause pour refuser l'extradition.) Deutscher Reichs-Anzeiger, 23rd January, 1885.

THE LIABILITIES OF BAILEES ACCORDING TO GERMAN LAW.

THE study of the law of bailments from a comparative point of view is interesting in various ways. The learned investigations of Mr. Justice Holmes have singled it out as an instance of the independent development of English law, and, though we may differ from many of the conclusions arrived at by the distinguished American jurist, there is no doubt that he has given a new and powerful attraction to the subject. From the point of view of analytical theory the law of bailments is also worthy of attention, because it sanctions contractual obligations which are often not contemplated by the parties, but are superadded by law because the agreement would otherwise be incomplete. The law of bailments thus creates obligations 'ex contractu' which do not arise, and in some cases cannot even be modified by the will of the parties. I also think that from the legislator's practical point of view, the study of the different systems adopted in Germany may not prove uninteresting.

It is well known that the term common law (Gemeinrecht) is applied in Germany to a modernized system of the Roman law, as it appears in Justinian's compilation. The common law was introduced into Germany as 'subsidiary' law (that is, it was only adopted in so far as it did not interfere with local or territorial usage), and as such it is still in force in a great part of Germany. In the other parts it has been superseded by Codes, of which the Prussian Landrecht, like the common law, has subsidiary application, while the Saxon Code and the French Codes (which are in use in the countries on the left bank of the Rhine and in the Grand-duchy of Baden) override the older local law. Since the establishment of the German Empire, a great many branches of the law have been modified by Imperial legislation, and the law of the individual territories has naturally been abrogated in so far as these enactments made it necessary. The German Commercial Code which, broadly speaking, is applicable in the case of all commercial transactions throughout Germany (and Austria), existed already as the law of the individual States before the formation of the Empire, and has since been re-enacted as an Imperial Statute.

There is much in the modern Codes, which is derived from Germanic law or has at least been influenced by it. We, there-

fore, propose to examine the law of bailment in (1) The Roman law; (2) the older Germanic law; (3) the modern Codes. The Austrian and Swiss Codes, though not in force in any part of Germany, have been included, as they are distinctly under German influence.

I. It may seem superfluous once more to dwell on questions which Bracton, Chief Justice Holt, and Sir William Jones have made familiar to English lawyers. It must, however, be remembered that the researches of modern German jurists have thrown new light on the classical authorities, and that a closer study of the Germanic sources has proved that the mediæval commentators were more under the spell of their own native law than they may have themselves suspected, and that their statements as to Roman law have not failed to be impressed by that influence. The English representations of these doctrines are largely derived from these authors. A fresh examination of the matter may, therefore, not be out of place.

In the first place the Roman terminology must be explained; the value of the expressions 'culpa,' 'diligentia,' 'custodia,' &c. deserves special notice.

Culpa (in the narrower sense of the word) is possible under two circumstances[1]: it may be the negligent (as distinguished from the wilful) infraction of a general duty, or it may be the negligent violation of a contractual obligation. Culpa in the first sense (Aquilian culpa) consists in the doing of an unlawful act, or in an omission connected with an unlawful act; in the second sense it is always an omission. Contractual culpa is always a want of diligentia. The Roman jurists, when naming a liability, sometimes mention the duty and sometimes the infraction: they say a person answers for 'culpa;' or he answers for 'diligentia;' when they say a person answers for dolus and diligentia, they ought really to say he is bound to *avoid* 'dolus' and to *employ* 'diligentia.' If we remember this habit, expressions implying that a person answers for 'culpa and diligentia,' or for 'culpa, but also for diligentia,' need not create any difficulty. It is only another way for stating that in addition to the responsibility for Aquilian culpa, there is a duty of diligentia (i.e. a liability for contractual culpa[2]).

As to the distinction between 'culpa lata' and 'culpa levis' it must be understood that the Romans did not wish to establish two separate kinds of negligence. 'Culpa lata' is rather the neutral zone between dolus and culpa[3]. 'Dolus' implies an un-

[1] Conf. Hasse, Culpa, p. 126, ss.

[2] Brinz, 2nd ed. II. § 266, note 10.

[3] Conf. Mommsen, Obligationen R. III. 358; Windscheid, Pandekten, I. § 101, note 10; the view of Binding, who actually holds that culpa lata implies an unlawful intention, is refuted by Pernice, Labeo, II. 414.

lawful intention, 'culpa' an absence of diligence or negligence; but some kinds of negligence are so inexcusable that they can hardly be distinguished from dolus. 'Culpa lata is an *excess* of negligence (nimia neglegentia), i.e. not to understand what everybody understands[1].' This kind of negligence, as regards civil liability, has exactly the same effect as dolus: 'Magnam tamen neglegentiam placuit in doli crimine cadere,' D. 44. 7. 1. § 5. In all cases where a liability for dolus is mentioned as regards contractual obligations, it must be understood that 'culpa lata' is included. Wherever the term 'culpa' or 'omnis culpa' is used it connotes 'culpa levis.'

If somebody, in the performance of a contractual obligation, has not given that amount of care which he is accustomed to bestow on his own affairs, the consequences will be the same as if he had been guilty of dolus: 'nisi tamen ad suum modum curam in deposito praestat, fraude non caret: nec enim salva fide minorem is quam suis rebus diligentiam praestabit[2].' This kind of culpa is sometimes called 'culpa in concreto.' On the other hand there are some kinds of contracts, in which the general duty of diligence (i.e. the avoidance of 'culpa levis') is relaxed; the diligence to be bestowed in such cases is called 'diligentia quam suis [rebus adhibere solet].' In both cases the debtor must apply the care which he is accustomed to give to his own affairs; yet there is a difference between them[3], the practical effect of which appears in the distribution of the burden of proof. If the debtor answers for culpa lata only, and if it is tried to extend his liability by showing that he was less careful than in his own affairs, the proof of this circumstance will be thrown on the creditor; on the other hand a debtor who, according to general principles, would have to answer for culpa levis, but who claims that, for special reasons, he was not bound to apply more care than that habitually bestowed upon his own affairs, must prove that the negligence upon which the action in a given case is based corresponds to his general habits[4].

There is, therefore, (1) a liability for wilful default, which is also applied in the case of gross carelessness; (2) a liability for the omission of diligence, the diligence required being generally that of an average man, a respectable householder (diligens paterfamilias), but sometimes only the diligence which the person concerned is in the habit of giving to his own affairs.

In addition to these there is, in all contracts which would be called bailments in English law, a special duty to watch over

[1] D. 50. 16. 213. § ult.; conf. also eod. t. l. 223 pr.
[2] D. 16. 3. 32. The point was not undisputed. Celsus holds this idea with Nerva, but against Proculus.
[3] Conf. Brinz, II. § 267.
[4] Dernburg, Preuss. Privatrecht, II. p. 162.

the safety of the bailed object; this duty is called 'custodia.' The 'diligentia in custodiendo' is subject to the same gradations as the general 'diligentia' (conf. Gaius, D. 18. 6. 2. § 1); the term custodia is, however, also used in a stricter sense, implying a liability for any loss which the bailee cannot prove to be due to vis major. The opinions as to the limits within which this absolute duty of custodia is required vary considerably. Baron[1] holds that this strict requirement of custodia must be understood wherever the authorities speak of 'custodiam praestare,' 'diligentiam praestare' (usually there is an addition implying that something more than the custodia or diligentia boni patrisfamilias is meant). He therefore subjects the following classes of bailees to this liability: (1) the 'dominus horreorum;' (2) the 'conductor operis' or 'operarum;' (3) the 'commodatarius;' (4) generally speaking the 'negotiorum gestor' and any persons obtruding their services as bailees; (5) possibly the 'creditor pigneraticius,' and (6) the persons mentioned in the edict (nautae, caupones, stabularii, as to the extended liability of whom there is no doubt).

Pernice[2] points out that there was originally a connection between 'custodia' as a form of possession and 'custodia' in obligatory relations[3], but he holds that the distinctive meaning of the term in either sense has been lost in later times. As regards the *duty* of custodia his results are summed up by him as follows:

1. The liability for 'custodia' was independent of the liability for diligence in the times of the Republic.
2. It involved an absolute protection of the bailed goods against theft (and probably against damage without violence).
3. That from the time of Hadrian custodia became 'diligentia in custodiendo,' the strict duty of custodia being confined to certain special cases.

As regards the later times, Pernice is practically at one with the representatives of the ruling opinion, who hold that it must be judged from the context whether in a particular passage 'custodia' in the stricter sense is meant, or whether 'custodia' means 'diligentia in custodiendo.'

A fact which deserves notice is the connection between the duty of 'custodia' and the 'actio furti.' Mr. Justice Holmes, in trying to prove the Germanic origin of the English law of bailments, lays much stress on the fact that in England bailees from early times

[1] Archiv für civilistische Praxis, LII. pp. 44–95; for a short summary of Baron's view see his Pandekten, § 237.

[2] Labeo, II. p. 339, ss.; his views are summed up on pp. 359, 360.

[3] Brinz holds a somewhat similar view; the point deserves notice, as there is a certain affinity between this doctrine and that propounded by Mr. Justice Holmes as being of Germanic origin.

had trespass and trover[1] against a person who stole the bailed goods[2]. The gist of his argument seems to point to the conclusion that in Roman law the bailee had no remedy against the thief; it will be easy to show that this view is not justified by the authorities.

The principle, according to which a person is entitled to the 'actio furti,' is stated by Ulpian (D. 47. 2. 10) as follows: 'Cujus interfuit non surripi, is actionem furti habet[3].' In ordinary cases the owner is the person 'cujus interfuit,' &c. When, however, the owner had a remedy against the person to whom the goods were entrusted, the bailee had the actio furti to the exclusion of the owner; only, where the bailee was not solvent, or where having been guilty of dolus or culpa lata, he lost the 'actio furti,' the owner was enabled to proceed against the thief through the medium of this action[4]. In other words, wherever the bailee was answerable for custodia (in the wider sense) the actio furti was given to him exclusively. The actio furti may, therefore, be used as a test for the liability of custodia[5]. A few passages may be quoted in support of this view:

Gaius, III. 203, 'Furti autem actio ei competit cujus interest rem salvam esse, *licet dominus non sit*.'

III. 205, 'Item si fullo polienda curandave aut sarcinator sarcienda vestimenta mercede certa acceperit, eaque furto amiserit, *ipse furti habet actionem, non dominus;* quia domini nihil interest ea non perire, cum judicio locati a fullone aut sarcinatore suum consequi possit.'

III. 207, 'Sed is apud quem res deposita est, *custodiam non praestat*, tantumque in eo obnoxius est, si quid ipse dolo malo fecerit, qua de causa si res ei subrepta fuerit . . . . . furti agere non potest, sed ea actio domino competit[6].'

In D. 13. 6. 10. § 1 Ulpian inquires as to the liability of a person to whom goods have been given for inspection. He answers, 'Si quidem mea causa dedi, dum volo pretium exquirere, dolum mihi tantum praestabit: *si sui et custodiam: et ideo furti habebit actionem*.'

The same jurist says in D. 47. 2. 14. § 15, 'Non solum autem in

[1] I must refrain from entering into a discussion of Mr. Holmes' views on the Roman theory of possession, and I have therefore avoided the term 'possessory remedies.' According to the Roman terminology, the actio furti is not a 'possessory remedy,' but the action of trespass or of trover would not be either.

[2] Common Law (Eng. ed., pp. 174, 175).

[3] The interest must be a legitimate one (honesta causa), D. 47. 2. 11 (Paulus).

[4] Conf. Windscheid, II. § 453, note 14. This subject is gone into with great care by Hasse, Culpa, ch. 10; see specially § 82.

[5] Brinz, II. § 269, 2 *a*.

[6] These passages are almost literally copied in Inst. 4. 1. § 13 (15), § 15 (17), § 17 (19).

re commodata competit ei cui commodata est furti actio, sed etiam in ea quae ex ea adgnata est, *quia et hujus custodia ad eum pertinet*[1].'

We have seen that custodia in the stricter sense means a liability which even the application of due diligence will not excuse, and that the opinions of the different writers as to the cases in which this strict liability is applicable varies. Nobody doubts, however, that there are various classes of contracts in which it occurs. We shall have occasion to go more closely into this matter. In this place we mention it to explain an error which prevailed in the Middle Ages and which, as we shall see below, having been incorporated into the Prussian Code, has been made a part of the law which is practised at the present day. Custodia in the stricter sense goes further than 'culpa,' but stops short of 'casus.' There is, therefore, a ground of liability between culpa and casus. The difficulty was solved by the mediæval writers by the introduction of a new kind of 'culpa,' 'culpa levissima.' The genesis of this view is clearly seen from the following passage. Vinnius (Comm. ad Inst. III. 25. § 5) explains the liability of naut. caup. stab. and continues: 'Igitur ex sententia juris consulti is qui recipit praestat medium aliquid inter culpam et casum fortuitum: *atqui hoc medium nihil aliud esse fateri omnes debent quam culpam levissimam.*'

Donellus already has shown that there is no such thing in Roman law, and Thibaut has given the doctrine its final death blow. At the present day nobody would attempt to resuscitate it. 'Custodia' in the strict sense involves a liability which cannot be removed even by the proof of the most careful diligence, but which is only excused, if it can be shown that the circumstance which caused the loss or damage could not have been avoided by *any* care or foresight.

The law as to the duties of bailees may now be summed up as follows:

1. In any case a bailee is answerable for dolus: an inexcusable kind of negligence, or a relaxation of the diligence which one is accustomed to give to his own affairs is for this purpose considered equal to dolus in its effects.
2. In other cases a bailee is answerable for culpa and for culpa in custodiendo, i.e. for the want of that degree of diligence which is generally required in the performance of a contract, and specially for a want of diligence in the measures taken for the safety of the bailed object. In some instances,

[1] That the actio furti was given to the person who was liable for custodia, on account of a physical relation to the bailed object, and not merely because his interest had been injured by the theft, appears from D. 47. 2. 14. § 10. The bailee's surety could not sue the thief 'neque enim . . . is, cujuscumque intererit rem non perire, habet furti actionem sed qui *ob eam rem* tenetur,' &c. (Julian, quoted by Ulpian).

however, the bailee will be excused, if he can prove that he has applied the degree of diligence he is accustomed to give to his own affairs.

3. There are special cases in which a bailee is liable for custodia in the strict sense, i. e. for any loss arising through a circumstance which he could have foreseen and prevented; this liability is sometimes increased to absolute insurance[1].

The duties of a bailee are, as a rule, dependent on the advantage he derives from the contract. If the whole advantage falls to the bailor (as in the case of a gratuitous deposit) the bailee's liability will not go beyond 'dolus' (including 'culpa lata' and 'culpa in concreto'). If both parties derive an advantage (as in the case of locatio rei, locatio operis, pignus, &c.) the bailee is answerable for 'culpa' and 'culpa in custodiendo[2],' with the qualification that in the case of partnership 'diligentia quam suis' is generally sufficient. It might be expected, that when the advantage is entirely on the side of the bailee his liability should be made more stringent, and the passages from which the principle may be gathered are rather puzzling with regard to this question; for instance, when it is said 'sed quia pignus *utrisque* gratia datur . . . . . placuit *sufficere*, quod ad eam rem custodiendam exactam diligentiam adhiberet' we are, not unnaturally, led to conclude that in those cases in which the bailment is made for the advantage of the bailee only, 'exacta diligentia' is *not* sufficient. There is, however, no passage from which it is quite clear that the gratuitous borrower of a chattel (commodatarius), whose case depends on the solution of this question, is answerable for custodia in the strict sense. It is generally held that he is not[3]; Baron is of the opposite opinion[4], but his arguments are rather desperate. It seems very probable that Pernice is right in holding that originally the 'commodatarius' was liable for any loss not arising from 'vis major,' but that gradually his liability came to be reduced to 'diligentia in custodiendo[5].'

Though in ordinary cases 'culpa,' as we have seen, is the omission of due diligence (i. e. the diligence of a respectable householder) it must be noticed that a person entering into a contract for the performance of which special qualifications are necessary, will be

[1] I have purposely refrained from introducing the term 'periculum.' When somebody is answerable for 'omne periculum' this is an absolute insurance; otherwise 'periculum' is used for the kind of risk to which, under the particular circumstances, the bailee is subjected. Conf. Hasse, § 77.

[2] The principle is stated D. 13. 6. 5. § 2; see also D. 19. 5. 17. § 2, and I. 3. 14. § 4.

[3] Windscheid, II. § 375, note 8. [4] Archiv f. c. Pr. LII.; § 6 of his article.

[5] Labeo, II. p. 354, ss.; see specially notes 35 and 40. The point is interesting, especially with reference to the connection between the 'actio furti' and 'custodia.' The limits of space do not allow it to be discussed at length. The Germanic law and some of the modern codes impose a stricter liability on the 'commodatarius;' see below.

made responsible for the absence of these qualities[1]. This rule may affect the liabilities of a bailee: 'Celsus etiam imperitiam culpae adnumerandam scripsit: si quis vitulos pascendos vel sarciendum quid poliendumve conduxit, culpam eum praestare debere *et quod imperitia peccarit culpam esse: quippe ut artifex*, inquit, conduxit,' D. 19. 2. 9. § 5.

A modification in the bailee's duty may be settled by special agreement, so as either to relax or to increase his liability ('nisi si quid nominatim convenerit vel plus vel minus in singulis contractibus, nam hoc servabitur quod initio convenit,' D. 50. 17. 23); the liability for dolus (including culpa lata) cannot, however, be taken away by contract, 'nam haec conventio contra bonam fidem contraque bonos mores est.'

Another modification arises from the effect of 'mora.' If the bailee is in mora (i.e. if he has delayed the re-delivery of the bailed chattel, after having received notice from the bailor), he will henceforth be liable, even for accidental loss, if it would not have occurred had the delay not taken place. If it would have occurred in any case, the bailee will still be liable, if in the case of the bailed chattel having been returned at the proper time, the bailor could have sold it before the occurrence of the event which occasioned the loss[2].

If the bailor is in mora, i.e. if the restitution of the bailed chattel has been offered to him at the proper time and place, and has been unlawfully refused by him, the bailee ceases to be liable for culpa, and will only have to answer for loss occasioned by dolus (including culpa lata[3]).

In those cases, in which the bailee is authorized to use the bailed object, he must not use it for any purpose foreign to the one agreed upon; if he does so he will be absolutely liable for any loss (I. 3. 14. § 2; D. 13. 6. 18 pr.).

A bailee who has once been guilty of 'dolus' will be held answerable, though the loss was not ultimately caused by his misconduct; for instance, if a bailed chattel (in the case of 'depositum') is sold by the bailee, he will be absolutely liable for the loss, and this liability will continue, though he repent and redeem the goods, and though they be damaged by an event quite unconnected with the previous sale (D. 16. 3. 1. § 25).

[1] Pernice, II. p. 336. There is in these cases an implied warranty of personal qualities. It seems that in some cases it is even looked upon as culpa to be unpopular with one's neighbours; see D. 19. 2. 25. § 4: 'Culpae autem ipsius et illud adnumeratur, si propter inimicitias ejus vicinus arbores exciderit.'

[2] This opinion is held by Mommsen, I. 269, III. 169; Windscheid, II. § 280, note 15. Savigny holds that the bailee who is in mora is in any case liable for accidental loss: System, vol. 6, §§ 273, 274, see specially p. 184.

[3] Conf. Mommsen, III. p. 285, ss.; Windscheid, II. § 346, note 2.

A point which deserves special notice is the effect of the bailed article having been valued by the bailor, with the intention that either the value or the object itself should eventually be returned to him. The most common instance is that furnished by the bargain which, in English legal terminology, is called 'sale or return[1]' (D. 19. 5. 17. § 1). Other instances are, however, mentioned: If I wish to borrow money, and the person to whom I apply has no current funds, but hands me some goods with instructions to sell them and to keep the proceeds as a loan, the question as to my liability with respect to the bailed object, before the sale has taken place, is of importance (D. 12. 1. 11 pr.). In both these cases the valuation has not in itself the effect of an insurance: they are judged by the general rule, only it is carried out more consistently. If somebody hands me goods with instructions to sell them at a certain price, or return them to me, this may have been done at my instance, at the intending seller's instance, or by mutual arrangement: in the first case, I hold the goods at my peril; in the second, at the seller's peril; in the third, I am liable for dolus and culpa. In the case of a sale for the purpose of lending the proceeds to the person whom the owner has authorized to sell, the loan may not be the only object, as the goods may have been intended to be sold at all events; if this was so, the transaction was for the advantage of both parties, and the bailee was liable for dolus and culpa, otherwise the bailee is answerable for all risk[2].

As the normal case of commodatum is a gratuitous loan for the sole benefit of the borrower, the effect of the 'aestimatio' in that particular class of bailment is to render the bailee liable for all risk (D. 13. 6. 5. § 3; conf. Windscheid, II. § 375, note 10). In the case of a partnership, however, the valuation does not create liability beyond custodia in the strict sense; vis major is, therefore, excused in such a case (D. 17. 2. 52. § 3).

A person who unnecessarily obtrudes his services as bailee is subjected to a more stringent liability. Julian says, that a person who has specially offered himself as depositarius, is answerable, not only for dolus (as in ordinary cases) but also for all degrees of culpa, and for custodia (in the strict sense), unavoidable accidents being the only ground of excuse (D. 16. 3. 1. § 35). In a similar way a person who voluntarily transacts business for an absent friend (neg. gestor) though, as a rule, not being answerable beyond culpa, becomes liable for accidental loss, if the transaction is one not usually undertaken by the principal (D. 3. 5. 10 (11)).

[1] Conf. Benjamin, p. 591, ss.

[2] See also Paulus, Sent. Rec. II. 4. 4; Mommsen, I. p. 279, ss.; Windscheid, II. § 383, note 10. The sale or return bargain is called 'Trödelvertrag' in German, and is of frequent occurrence.

To sum up: a bailee's duty is modified (1) by special agreement, (2) by 'mora' on the part of the bailor or of the bailee, (3) by an unauthorised use of the bailed object and by any misconduct respecting it, though not connected with the event which caused the loss, (4) by the valuation of the bailed article, (5) by the bailee's unsolicited intervention.

It remains to specify the cases in which custodia, in the strict sense of the word, is required. According to the better opinion this liability occurs:

1. In those instances in which a duty of custodia, in the wider sense, existing already according to general principles, custodia has been expressly promised (D. 16. 3. 1. § 35; and D. 19. 2. 13. § 5), or a special reward has been agreed upon for custodia (D. 19. 2. 40; D. 47. 8. 2. § 23[1]).

2. In some specified cases, in which the bailee's calling seems to require more than ordinary watchfulness, though the reward given or promised do not apply to custodia. The most conspicuous instance is that of nautae, caupones, stabularii, whom the Praetorian edict declares to be liable for all loss or damage not caused by vis major. The Roman lawyers did not by any means look upon this case as anomalous, they bracket it with other cases in which a liability for strict custodia is required (see Gaius in D. 4. 9. 5 pr.; Ulpian in D. 47. 2. 14. § 17, 'et erit in hunc casum similis causa ejus et cauponis aut magistri navis,' &c.), and it is expressly explained in the words of the edict, that the liability is due to an implied promise of custodia in the strict sense 'quod cujusque *salvum fore receperint*.' The storekeeper (dominus horreorum) was equally held liable for 'custodia' in the strict sense (conf. D. 19. 2. 60. § 9; and C. 4. 65. 1). It seems also probable that the fuller and tailor were liable for the materials entrusted to them in the same manner[2]. The reward which any of these persons receives is not to be looked upon as an insurance premium, 'Nauta et caupo et stabularius mercedem accipiunt non pro custodia, sed nauta ut traiciat vectores, caupo ut viatores manere in caupona patiatur, stabularius ut permittat jumenta apud eum stabulari: *et tamen custodiae nomine tenentur*. Nam et fullo et sarcinator non pro custodia, sed pro arte mercedem accipiunt et tamen custodiae nomine ex locato tenentur.'

The reason why the extended liability is introduced, and why the liability for vis major is excluded in these cases, is well explained by Dernburg (Pr. Privatrecht, II. p. 160). It may be useful to quote

[1] See Goldschmidt, Zeitschrift f. Handelsr. III. p. 326.

[2] Conf. Baron, § 3; Pernice, II. p. 350; Gaius, III. 205; and Gaius in D. 4. 9. 5. Windscheid and other writers do not think that there is a liability for custodia in the strict sense, but Windscheid admits that his interpretation of the last quoted passage is a 'hard' one.

the passage, because it will serve to explain the nature of vis major. 'A person who makes a contract in an individual instance only performs his obligation, if in the given case he applies the diligence of a careful man. But a person who carries on the trade of an innkeeper, &c. . . . . has to do more. He is bound to make permanent arrangements to secure persons contracting with him . . . against loss. Whoever neglects to do so is liable on account of the imperfection of his precautions, even though in a given case no default can be imputed to him. The effect of lightning is in our days no instance of vis major, whenever it could be avoided by lightning conductors. Continuous rain which damaged goods that were carried is no vis major, as proper stowage could have protected them[1],' &c.

A question which has been much debated is the liability of bailees for the acts and omissions of their agents and servants[2]. In all cases in which a bailee is liable beyond his default (according to what has been explained before) he will naturally be liable for the culpable acts of his servants. As regards other cases the bailee is, as a rule, answerable for his own negligence only, which, however, need not have been manifested in a particular act, but also in the careless selection or inspection of his servants (culpa in eligendo sive custodiendo), or in the unauthorized substitution of other persons in the execution of duties which were entrusted to him personally[3]. There is one class of cases as to which a liability of the principal seems to be established, though there be no general duty of strict custodia, and though there be no default on his part; I refer to the much debated case of the 'conductor operis.' The leading jurists are divided into two camps on this question, Windscheid and Goldschmidt denying a liability, when the conductor is not personally in default; Brinz and Dernburg[4], on the other hand, holding him answerable for the culpable acts and omissions of his servants and agents, in so far as they occurred in connection with the execution of the work. The controversy mainly turns on the meaning of 'que'

[1] Vis major must be taken to mean precisely what 'the act of God' means in English law, an 'event which, as between the parties and for the purpose of the matter in hand, cannot be definitely foreseen or controlled.' (Pollock, Principles of Contr., p. 367). The Greek equivalent is *θεοῦ βία*; cf. D. 19. 2. 25. § 6. I do not understand on what ground Mr. Justice Holmes holds that 'the exemption from liability for acts of God and the public enemy is characteristically English.'

[2] Conf. specially Wyss, Haftung für fremde Culpa; Goldschmidt, Verantw. des Schuldners für seine Gehülfen in his Zeitschr. XVI. 287–382.

[3] As to culpa in eligendo, D. 13. 6. 10. § 1 and 11; D. 13. 6. 20; as to unauthorized substitution, D. 19. 2. 13. § 1. Substitution is, of course, authorized in many cases, and may even become a duty; see Goldschmidt, Zeitschr. XVI. on p. 301; for a detailed statement conf. Mommsen, Beiträge z. Oblr. I. 64.

[4] Conf. Windscheid, II. 509, note 5; Goldschmidt, l. c., p. 352; Wyss, l. c., p. 93, ss.; on the other side, Brinz, II. p. 277; Dernburg, II. p. 158, note 5; also Lewis, Die neuen Konnossementklauseln, p. 14, ss.

in the passage D. 19. 2. 25. § 7, and as, at any rate, the arguments in favour of the interpretation preferred by the latter authorities do not seem less conclusive than those of their opponents, the question may well be decided from the point of view of general convenience. This has been done by a recent decision of the German Reichsgericht. The following part of the judgment contains a very clear statement of the question at issue: 'the obligation of the conductor operis is not exhausted by certain individual acts, aiming at the execution of the work contracted for, which according to the concrete circumstances of the case may be expected from him personally (possibly including the careful selection and, sometimes, the supervision of his assistants), but he engages immediately to effect the final result as a whole. A person contracting in this manner has to answer to himself only (hat es lediglich mit sich selbst abzumachen), if by some reason he is not in a position to accomplish the result in question by his own unaided efforts, he employs the assistants required for the execution of his work at his own exclusive peril[1].'

One further point ought to be noticed. A bailee is bound by his contract to deliver the bailed object when the time comes. If he fail to do so, he may be excused, if, though having exercised the diligence required in the special circumstances, he be unable to perform the obligation; but it is for him to prove that he has exercised the necessary degree of diligence, not for the bailor to prove that he has been wanting in it[2]. As, therefore, the conductor operis would in any case have to prove that he was not careless in the selection and supervision of his assistants, the number of cases in which it would be necessary to rely on a more extended liability is considerably reduced[3].

II. A full statement of the view which the Germanic sources take of our subject cannot be attempted in these pages; it may suffice to enumerate, as concisely as possible, some of the characteristic features which they exhibit in common, and to examine whether the discrepancies between Germanic and Roman law are due to a fundamental difference in the conception of a bailee's liability, or whether they are to be ascribed to circumstances of a less permanent character. It must not be forgotten that the Roman jurisprudence, as exhibited in the Institutes of Gaius and in Justinian's compilation, was imbued with the results of centuries of scientific work, and was applied to a highly-developed state of industry and commerce, whilst the earlier Germanic law, in both

[1] Decision of June 23, 1883; R. G. Entsch 10, p. 164, ss.
[2] Conf. Dernburg, II. p. 161.
[3] For the view of the modern codes on the liability of the cond. op. for his assistants, see post, p. 209.

respects, presents the features of a far more backward state of society. Legal doctrines at this stage are not looked upon as an organic whole, they are based on detached rules, not on systematic principles; the circumstances to which they are applied are, at the same time, simple and not subject to much variation. We, therefore, notice a great diversity in the legislation, and on the other hand a great rigidity in the application of the law. These causes seem quite sufficient to account for whatever difference there is between the Germanic and the Roman law of bailments.

The sources of Germanic law before the reception of the Roman system may be subdivided under two heads. The first comprises the Codes drafted for the various Germanic races after the great migrations, which are known under the name of 'Volksrechte' or 'leges barbarorum;' their dates range from the fifth to the eighth century. The second includes the law-books, beginning with the Sachsenspiegel (1230), which were written by private persons, but came to be looked upon as authoritative statements of the law. Additional material is derived from Imperial and territorial laws and recorded judicial decisions.

(A) Volksrechte[1].

The following are the characteristic features on the subject of bailments.

α. Theft imposes a liability independent of the bailee's guilt. In the edict of Liutprand, VI. 131, the bailee is made to restore the stolen goods. The laws of the Bavarians and the Wisigoths (L. Bajuv. XIV. 4. 1–4; L. Wisig. V. 5. 3) stipulate that a time is to be fixed for finding the thief; if he be found, the bailee compensates the bailor (having his remedy against the thief), if not the loss is divided between bailor and bailee.

β. The liability arising from loss not caused by theft depends on the questions of reward and guilt.

When no reward has been given or promised, and the bailee proves by his oath that he has not been guilty of any default or negligence (non per suam culpam neque per negligentiam), the loss falls on the bailor (L. Baj. XIV. 1. 2 and 3; L. Wisig. V. 5. 1).

The same rule applies, though the bailment was entirely for the bailee's benefit (commodatum) (L. Baj. XIV. 1. 4; L. Wisig. V. 5. 1 [last sentence] and 2.

When the bailee has received a reward he will be absolutely liable for all loss (L. Baj. XIV. 1. 1; L. Wisig. V. 5. 1).

While, in the case of cattle dying, the defendant's oath was

[1] The Germanic law of bailments has been explained by Stobbe in his essay, 'Zur Geschichte des deutschen Vertragsrechts,' pp. 209–305; for a short statement of the main features, see the same author's Deutsches Privatrecht, III. pp. 233–238.

considered sufficient to prove that he was not guilty or negligent, a rough test of the bailee's innocence was substituted in other cases. If somebody in the case of fire and similar accidental events had saved his own goods and lost the bailor's goods, this was considered as a proof that a fault was to be imputed to him, and he was bound to indemnify 'sine aliqua excusatione.' On the other hand, the bailor had to indemnify the bailee, if he sacrificed his own to save the bailed goods. If both lost part of their goods, the judge had to apportion the loss (L. Wisig. V. 5. 5).

In the case of a pledge, the pawnee was considered absolutely liable. This is expressly stated with reference to pledges taken as a measure of private execution. Within the time allowed for redemption, the pawnee had to answer for all accidental loss (Ed. Rothar 257).

The features to be noted, therefore, are:—

1. The absolute liability in the case of theft.
2. The absolute liability in the case of a reward (a gratuitous borrower being looked upon as an unrewarded bailee, but a pawnee being treated in the same manner as a bailee for reward).
3. The artificial rules of evidence used to establish guilt, according to which the implicated party's oath and sometimes the fate of the bailee's own goods, as compared to that of the bailor's goods, was decisive.

(B) The later law.

The law-books of later times are often held to be less under the influence of Roman doctrines than the leges barbarorum[1]. The rules laid down by them, and especially by the 'Sachsenspiegel,' which is the oldest and most original of these books, are, therefore, of special importance. As will be seen, they differ in some parts very materially from those of the 'Volksrechte.'

The absolute liability in all cases of theft is no longer universally recognized. The Sachsenspiegel, for instance, says that, in the case of depositum without reward, the bailee will not be liable for loss by *theft*, robbery, fire or death, if he can swear that he was not in default (Sachsenspiegel, III. 5. § 3).

The fact of a reward having been paid seems to have imposed an absolute liability on the depositarius in the same manner as in the 'Volksrechte' (conf. Stobbe, p. 228).

[1] Gerber, System des d. Privatrechts, calls these law-books 'Die vollkommenste Erscheinungsform des deutschen Rechts,' p. 32; Stobbe calls the rule of the Sachsenspiegel as to commodatum, 'reines deutsches Recht' as distinguished from the less purely German doctrines of the leges barbarorum; l. c., p. 236.

Some of the books differ from the 'Volksrechte' in the case of commodatum. The Sachsenspiegel, for instance, establishes an absolute liability in this case (III. 5. § 4). The Schwabenspiegel has conflicting statements on the subject (Art. 222, and Art. 230; see Stobbe, p. 237).

The pawnee is generally considered absolutely liable as in the Volksrechte (see for instance Sachsenspiegel, III. 5. § 4); only in later times more lenient rules were adopted, the liability being made dependent on culpa (conf. Stobbe, p. 256, and authorities quoted there). The so-called 'essende Pfänder' are sometimes mentioned separately, the rule being to release the debtor from his debt, and the creditor from his liability to return the pledge, if cattle was pawned and died (Sachsenspiegel, III. 5. § 5, and authorities quoted by Stobbe, p. 258). It may easily be seen that this is only a rough and ready method to save the trouble of assessing the damages, and does not establish a new principle as to the liability.

The artificial rule of evidence mentioned above, by which the question of the bailee's negligence is ascertained by the fate of his own goods, is still found in some books, but the fallacy of this rule begins to be seen. The augmented Sachsenspiegel in a very quaint passage asks, why a difference should be made in the liability of the bailee, because the thief in his hurry takes your goods and not others? and what satisfaction it can be to the bailor, that the bailee's own goods have been lost? (IV. 42 d. 17, quoted by Stobbe, p. 222).

We have seen that the calling of certain classes of bailees in Roman law imposed a special liability upon them. Analogous cases exist in Germanic law. The herd, for instance, is generally liable for cattle that he loses (Sachsenspiegel, II. 48. § 1).

If a robber or a wolf take anything away, and the herd at the same time be not made a prisoner, and if he do not raise the hue and cry, so as to have witnesses, he is liable: otherwise he will be excused, the case being one of vis major (Sachsenspiegel, II. 54. § 4).

In a similar way artisans are made answerable for the material entrusted to them (Stobbe, p. 246).

A liability for carriers and ship-owners which stops short of casus, but is independent of any proved default, also existed before the formal reception of the Roman law (see Stobbe, p. 248). There is a judgment of the Frankfort Court (1401, quoted by Goldschmidt, Zeitschr. III. p. 343) which throws light on the subject. A company of carriers had lost part of the goods entrusted to them. They plead that all care had been taken, and that a servant had special charge of the goods. It was held that they

are answerable unless the goods have been taken by violence (raublich genommen), or unless they had been placed under judicial arrest[1].

As to innkeepers, there are passages indicating their absolute liability in case of theft; others, however, only declare that such persons are bound to use more than ordinary care (Stobbe, p. 231).

The characteristic difference between the Roman and Germanic law of bailments must be sought more in the methods of proving the ground of liability in a special case, than in dissonant conceptions of the main basis of the liability. The elements of reward, guilt, and special calling are of importance in both systems; what we miss in the Germanic system are the gradations of culpa and the latitude in the manner of establishing it; if the bailee's goods are safe and the bailor's goods lost, the bailee's default is considered proved; if no such outward test exists, the defendant's oath is conclusive. The special liability in the case of theft which we have seen to exist in some of the Volksrechte is best explained by the same principle: a person who had received goods with the special intention of taking care of them, was to be considered negligent if those goods were stolen. If the fact that the bailee has his remedy against the thief had been the ground of his liability, the rule of L. Wisig. V. 5. 3, and L. Bajuv. XIV. 4. 2, by which he has to bear half the loss if the bailed object cannot be recovered within three days, would not be intelligible. If it be considered as due to the idea, that (theft being an evidence of negligence) it was but fair that the depositarius, though unrewarded, should incur part of the loss, the difficulty disappears.

The mediæval writers on Roman law must have been considerably influenced by Germanic ideas. The theory of custodia in the strict sense was imperfectly understood by them, and starting from the principle 'casum sentit dominus,' they knew of no liability arising otherwise than in consequence of culpa. They found, on the other hand, that in the Germanic systems which surrounded them, there were numerous instances of a liability for which the ordinary culpa was not a sufficient ground: it was an easy way to remove the difficulty by saying that, in those cases there was still culpa, though culpa levissima—especially as this extreme degree of culpa could also be assumed in those cases arising in Roman law, for which the ordinary theory was not sufficient[2].

[1] A judgment of the Court of Danzig (1429), quoted by Goldschmidt, l.c., decides that carriers are liable for the acts of their servants.

[2] A passage from Vinnius has been quoted above. Azo, in the case of commodatum, for which the Sachsenspiegel had introduced an absolute liability, mentions dolus et lata culpa et levis et levissima. Summa in cod. de comm. n. 10, quoted by Stobbe, p. 238.

Mr. Justice Holmes has tried to connect the absolute liability in the case of theft, of which we have attempted to give an explanation, with the rule of Germanic procedure, which gave a person, out of whose custody goods were stolen, an exclusive right to sue for their recovery (the bailor being limited to his claim on the bailee)—a rule generally expressed by the sentence: 'Hand muss Hand wahren.' He says, that as 'the remedies were all in the bailee's hands, it also followed that he was bound to hold his bailor harmless[1];' but this, as we have explained, would not account for the bailee's liability to suffer the whole or part of the loss in those cases in which the thief cannot be found. The same Codes which have the liability in case of theft, impose on certain classes of bailees (depositarius with reward, pawnee) a responsibility for loss, however arising, which Mr. Holmes' hypothesis would not explain. If we look at the Sachsenspiegel, which as we have seen is considered one of the purest sources of Germanic law, we find that the bailor has no remedy except against the bailee (II. 60. § 1), and yet the unrewarded depositarius is not liable for theft (III. 5. § 3) if he has not been guilty of negligence. Stobbe thinks that the rule of procedure was limited to the cases in which the bailee was liable (p. 274), which is of course inconsistent with the assumption that the bailee's liability was based on the rule. Under these circumstances it seems most probable that the passage from Beaumanoir, quoted by Mr. Holmes (167), correctly describes the sequence of cause and effect, and it is safer to assume that the rule 'Hand muss Hand wahren' was a consequence of the bailee's extended liability, than to proceed in the opposite direction[2]. The connection between the liability for custodia and the actio furti bears a striking analogy to the connection between the bailee's liability in German law and the 'clage umme varende have.' At any rate the English actions of trespass and trover have a much greater resemblance to the actio furti than to the remedy given to the German detentor.

III. We have now to turn to the modern codes. We have seen that in Roman law 'culpa' means the omission of ordinary diligence; that there is, however, a degree of negligence (culpa lata) which, as far as contractual relations are concerned, has the same consequences as unlawful intention (dolus); we have further seen that the Germanic authorities do not distinguish between different degrees of 'culpa,' but only speak of guilt (scult) generally; and finally we noticed that the mediæval writers on Roman law, misunderstanding the meaning of 'custodia' in the strict sense, and trying to harmonize the cases in which an absolute liability existed

[1] Common Law, Engl. ed., p. 167.

[2] Conf. Heusler, Gewere, p. 495.

in Germanic law, whilst in Roman law the liability was made dependent on culpa, introduced a new kind of culpa, 'culpa levissima.' The modern codes fluctuate between those three different systems. The Prussian Landrecht adopts the three degrees of 'culpa,' and defines them as follows:—

I. 3. § 18. Negligence which, in the case of ordinary aptitude, could have been avoided without any effort of attention, is called *gross* negligence (grobes Versehen).

I. 3. § 20. Negligence which could have been avoided with an ordinary degree of attention is called *moderate* negligence (mässiges Versehen).

I. 3. § 22. Negligence which could have been avoided only by the aid of distinguished aptitude, or of a special acquaintance with the object or the transaction, or by an extraordinary effort of attention, is called *slight* negligence (geringes Versehen).

The Saxon Code knows only two degrees of culpa, and defines in § 122 *slight* negligence (geringe Fahrlässigkeit) as the omission of that care which a prudent and diligent householder is in the habit of exercising; *gross* negligence (grobe Fahrlässigkeit) as the omission of that care which even a less prudent and less diligent person is in the habit of exercising. The Swiss Code of the Law of Obligations (1881) adopts the same distinction without attempting a definition (see for instance § 114).

The Austrian and French Codes speak of one kind of culpa only[1], but the French Code extends or attenuates the corresponding obligation according to the circumstances (C. Civ. §§ 1137. 2. 1374. 1928. 1992, &c., &c.).

The German Commercial Code introduces a special kind of diligence for commercial transactions, the 'diligence of a prudent trader' (H. G. B. article 282).

The principle of 'diligentia quam suis' as an attenuation of the ordinary duty of diligence, is retained in the Prussian (L. R. I. 17. § 211), Saxon (§ 1371), Swiss (§ 538), the French (§ 192), and German commercial (article 94) Codes, but does not appear in the Austrian Code.

The artificial rule of evidence which establishes the fate of a bailee's own goods as a test of his diligence (conf. p. 200) has been retained in the Saxon Code. In the case of a 'depositum,' the bailee is liable, if his own goods have been saved, unless he can prove that he could not have saved both his and the bailor's goods (§ 1266). In the case of 'commodatum' he is absolutely liable, if his own goods have been saved (§ 1177). The Prussian (L. R. I. 14.

[1] The omission of 'pflichtmässige Obsorge' (A. C., § 964), or of 'Les soins d'un bon père de famille' C. C., § 1137; conf. Sainctelette, De la Responsabilité, p. 22 (1).

§ 20) and Austrian (§ 964) Codes expressly state that the depositarius is not obliged to sacrifice his own goods to save those of the bailor.

The rule of Roman law according to which, generally speaking, a party deriving no advantage from a contract is not liable beyond dolus, whilst a party deriving an advantage is liable for all degrees of culpa, has been to some extent modified in the modern codes. The Landrecht (I. 5. §§ 278–280) stipulates that a party deriving an advantage from a contract, which gives no benefit to the other party (e.g. a gratuitous loan of a chattel), is liable for culpa levissima, and that in the case of the other party deriving an advantage at the same time, he is liable for culpa levis (e.g. locatio rei); on the other hand, a party deriving an advantage from a contract is liable for culpa lata only (e.g. depositum). The Saxon Code retains the rule of Roman law as pointed out above (S. C. § 728). The French Code having adopted only one kind of culpa, requires the 'soins d'un bon père de famille' from all bailees, 'soit que la convention n'ait pour objet que l'utilité de l'une des parties, soit qu'elle ait pour objet leur utilité commune' (article 1137). The duty of giving the care of a respectable householder is however increased or relaxed according to the nature of the contract (article 1137. 2; see also articles 1374, 1728, 1928, 1992). In the same way the Swiss Code, though not classifying the different kinds of contracts according to the degree of diligence required, stipulates in a general manner, that a party who expects no advantage is to be looked upon with greater leniency (§ 113).

In the case of depositum, the Prussian and French Codes adopt the rule of Roman law that the customary diligence must be employed (L. R. I. 14. § 11; C. Civ. article 1927), and the same rule is adopted by the German Commercial Code, the Landrecht, the Saxon and Swiss Codes (H. G. B. article 94; L. R. I. 17. § 211; S. C. § 1371; Sw. C. § 538), with regard to the duties of partners. The unrewarded mandatarius, who in Roman law must give ordinary diligence, is, according to the Landrecht, released from his obligation if he has given the care he gives to his own affairs (L. R. I. 13. § 55). According to the French Code the unrewarded agent is treated with greater leniency (C. Civ. § 1992).

We have noticed that in Roman law a person who obtrudes his services is subject to a more stringent liability. The principle of this rule is adopted by the Landrecht and the French Code in the case of depositum (L. R. I. 14. § 18; C. Civ. article 1928. 1); the Landrecht also applies it in the case of negotiorum gestio (L. 13. § 245), and the Saxon Code states generally, that a person who enters into a transaction in this manner is liable for culpa levis, though he derive no advantage from the contract (§ 729).

We have seen that in Roman Law a person entering into a contract, for the performance of which special qualifications are necessary, is answerable for the absence of these qualities. The Prussian Landrecht has adopted the same principle, and provides that 'any person who has undertaken the performance of an act which presupposes special technical knowledge, must answer for the *slightest* negligence in the performance of the obligation.' I. 5. § 281 [1].

As a general rule, a bailee's liability may be modified by special agreement. The view that culpa lata, being akin to dolus, produces a liability which cannot be excluded by contract, has been adopted in Prussian Law [2] and by the Swiss Code (§ 114. 1); the Saxon Code, though recognizing the distinction between culpa lata and culpa levis, prohibits those contracts only which exclude the liability for wilful default (dolus) (S. C. § 123). The French and the Austrian Codes, as we have seen, do not adopt different degrees of culpa, and as a general rule, therefore, the liability for all degrees of negligence may be removed by special agreement [3]. There are, however, some special cases, in which the liability cannot be excused. The German Commercial Code specially provides that Railway Companies cannot, with a few exceptions, contract themselves out of their statutory liability (article 423). In a more general way the Swiss Code establishes the rule, that, in the case of a liability, connected with the exercise of a trade under government license, a private stipulation at variance with such liability may be declared void at the discretion of the judge (§ 114. 2) [4]. The French Code, on the other hand, prohibits an extension of the bailee's liability in the case of the bailing of cattle (bail à cheptel) (C. Civ. article 1811).

Mora and unauthorized use create a modification of the liability as in Roman law, but the detailed provisions offer no point of special interest.

The rule of Roman law according to which, in some cases, the bailee's liability is increased, in consequence of the valuation of the bailed chattel, has not been without influence in the modern Codes. The Code Civil (§ 1883) expressly states that, in the case of commodatum, the effect of the valuation is to give the bailor a right of compensation even for accidental loss. In the same way

[1] See also I. 11. § 921 (locatio operis); as to mandatum, the normal requirement is, as we have seen, diligentia quam suis; this is increased to liability for moderate negligence in the case of an unrewarded, and to liability for slight negligence in the case of a rewarded expert (I. 13. §§ 57, 58).

[2] See decisions quoted in Rehbein and Reincke's edition of the Landrecht; note to I. 5. § 283; confer also I. 20. § 241.

[3] As to French law, conf. Sainctelette, De la Garantie, p. 22.

[4] And specially as to carrying enterprises, § 465.

the Saxon Code provides that the hirer of a chattel, or a person borrowing cattle in exchange for some counter performance, is presumed to be liable for loss or deterioration, if the goods or the cattle have been valued[1] (§§ 1209, 1210). In the case of the 'sale or return bargain' (Trödelvertrag) the Prussian and Saxon Codes do not impose any liability beyond that imposed on a rewarded depositarius (L. R. I. 11. § 516; S. C. § 1292). The other Codes have no special provisions on the subject.

There remain the special cases of innkeepers and carriers:

An innkeeper is liable for the deterioration or loss of articles in the possession of his guests, unless the damage has resulted from the guests' own default or from vis major (L. R. II. 8. § 444, ss.; C. Civ. §§ 1952, 1953; Sax. C. §§ 1280, ss.; Swiss C. § 486, ss.). The Austrian Code is the only one which has not adopted this rule, and makes an innkeeper answer in the same manner as an ordinary depositarius[2]. The Reichsgericht holds that a traveller neglecting to inform the innkeeper that money, jewels, or securities of a certain value are part of his luggage, is guilty of contributory negligence (R. G. Entsch I. p. 83)[3]. The Cour de Cassation, on the other hand, has decided that the innkeeper is liable, though the guest has omitted to state that he has valuables in his possession (notwithstanding a printed notice to that effect), and though the valuables were left in the pockets of the clothes which the traveller himself handed to the innkeeper's servants for cleaning (Judgment of May 11, 1846; see note in Rivière & Pont's edition of C. C. on p. 279). If the innkeeper expressly declares that he will not be responsible for the traveller's goods, he will not be liable beyond culpa levis (on his part or that of his servants) (L. R. II. 8. § 448; Saxon C. § 128)[4]. The Saxon Code provides that a printed notice will be of no effect, except in the case of money, securities and jewellery, and unless the landlord offers to take such articles into his own custody (S. C. § 1288). The Swiss Code declares such a printed notice to be of no effect (§ 487).

Carriers: The liabilities of carriers by land and by sea for the safety of the goods entrusted to them is, within the German Empire, and in Austria, regulated by the provisions of the German Commercial Code (articles 395 and 607). They are responsible for all damage arising from the loss and deterioration of the goods, unless they can prove that such damage has resulted (1) from

[1] The rules as to the borrowing of cattle are complicated and varied; see C. C., § 1800, ss.; R. L. I. 21. § 452, ss.; Stobbe, D. Priv. R. III. 266.

[2] A. C. § 970; as to his liability for the torts of his servants, see below.

[3] The same decision establishes the rule that the innkeeper's liability begins from the moment in which the traveller has entered a carriage sent from the inn to bring him there.

[4] As to French law, see Sainctelette, l.c., p. 206.

vis major; (2) from the natural condition of the goods; (3) from defects in the packing which could not have been noticed from outside. Damage due to some defective condition of a ship is considered as resulting from vis major, if such defective condition could not have been discovered with proper care (article 607. 2). Carriers are not liable for the loss or deterioration of valuable articles (jewels, money, securities) unless the nature or value of the goods has been declared (article 395. 2; article 608).

As we have seen, Railway Companies are not, as a general rule, authorized to restrict their liability as carriers by contract (article 423); other carriers may do so, in so far as it is compatible with general principles.

The French Codes have very similar provisions, affecting not only carriers, but also forwarding agents[1] (Code Civil, 1782–1786; Code de Commerce 98, 103). Railway Companies are responsible for valuable articles, though they have not been declared, unless they are of a kind specially subjected to an ad valorem charge (Decision of the Cour de Cassation 1873; see note to p. 19 in Rivière & Pont's Code de Commerce); and carriers are generally liable for money contained in a passenger's trunk, though not declared, if the amount was in proportion to the presumed requirements of the journey (Cour de Cassation 1859; see R. & P., C. C., note to p. 260).

It seems that the question as to the possibility of limiting the legal responsibility of a Railway Company by private agreement has been much debated in the countries using the French Codes. The French Cour de Cassation has lately decided that the effect of a contract releasing a Railway Company from liability is only to reverse the burden of proof. The Company has not to prove that the loss was occasioned by vis major or inherent defects of the goods, but the plaintiff has to prove that the loss was occasioned by the default of the Company's servants. In Belgium the legality of private agreements is fully recognized[2]. The provisions of the Swiss Code are of a similar nature[3].

As regards the liability of a principal for his agents or servants, it can be discussed here only in so far as the acts or omissions of agents and servants constitute a breach of the principal's contractual obli-

[1] The German Commercial Code requires the forwarding agent to exercise the diligence of a prudent trader, but does not impose any further liability unless he has undertaken the forwarding of the goods at a through rate, or acts himself as carrier (Arts. 380, 384).

[2] The whole question is discussed at great length by Sainctelette, l. c.; see specially pp. 52–86.

[3] See §§ 457, 465–468, the liabilities of the Railways and the Post Office are regulated by special enactments; as to agreements intending to modify the liability, see above, p. 207.

gation. Wherever the principal is liable for any damage not arising from vis major, he must naturally answer for the acts of the persons whom he employs during the performance of the contract, as long as they are in connection with such performance. In the same way the principal answers, according to Roman law, for the acts and omissions of his servants, if he has been careless in their selection or superintendence. In the Prussian and Austrian Codes this principle has been somewhat relaxed. According to the Prussian Code the principal who has been guilty of gross or moderate negligence in the selection of his agent, is liable only in so far as the agent is unable to compensate the damaged party (L. R. I. 6. § 53). The Austrian Code states that whoever engages an incapable person for the execution of any work, is liable for the damage resulting therefrom (§ 1315), and that innkeepers as well as carriers by land and by water must answer for any damage caused by their servants to the goods placed into their custody (§ 1316). In the case of mandatum, the unauthorized substitution of a third person does not remove the liability from the principal, according to Prussian (I. 13. §§ 38. 48) and Austrian (§ 1010) law; whenever such substitution has been authorized or has become necessary by unavoidable circumstances, the principal is, according to the Prussian Code, liable for moderate negligence in the selection, and, in the latter case, in the inspection of his agents (L. R. I. §§ 39. 46. 47); according to the Austrian Code he is liable for any negligence in the selection. As to the case of locatio conductio operis we have pointed out that, in Roman law, the subject has given rise to controversies, but that a recent decision of the Reichsgericht has established the liability of the conductor operis for his assistants (see p. 198). The authors of the Landrecht had settled the question in the same manner (I. 11. §§ 928–930).

The French and Swiss Codes go much further in imposing a liability for the acts of servants and agents; the Code Civil by the well-known article 1384; the Swiss Code by § 115. 1, which provides that 'A debtor is responsible for the culpable acts of members of his family, being under his control, of his clerks and of his workmen[1].'

Though, on the whole, the rules of the modern codes follow the system of the Roman law, the traces of Germanic influence are to be noticed in various directions. The recognition of 'culpa levissima' in the Prussian Landrecht makes it still possible to distinguish the cases in which the Germanic law had a liability more stringent than that for ordinary culpa, e.g. in the instance of

[1] For a full account, conf. Goldschmidt, Zeitschrift, XVI. 287–382; Stobbe, D. Priv. R. III. 387–401; Dernburg, Priv. R. II. pp. 157–159.

commodatum. The Saxon Code still makes the proof of gross negligence in the case of depositum depend on the fate of the bailee's own goods. The 'bail à cheptel' of the French law reminds us of the Germanic rules as to the bailment of cattle. Carriers by land are under the same liability as carriers by sea, as they were before the reception of the Roman law. If no new fundamental modifications have been introduced, the reason must be looked for in the fact that no fundamental difference can be found between the Roman and the German system.

IV. In the earlier English law, Germanic influence can be traced in a similar way. Glanville (10. 13) states that the commodatarius is liable for loss, however it may occur[1]. It follows from this that the commodatarius, as in the Sachsenspiegel, was under a special liability; it could not have been founded on his remedy against the thief, as loss of any kind is clearly spoken of (si autem res ipsa interierit vel perdita fuit quocumque modo in custodia tua). The cases in the Year Books remind us of the rule about the fate of the bailee's own goods. It is said in 29 Ass. 163, pl. 28, 'Si un a moy bail' ses biens agard' et jeo les mitt enter les mains et ceux soient emblées jeo ne serr̄ pas charge.' Again in 8 Ed. II. 275, the defendant pleads (inter alia) that the chattels were taken with his own goods ('larouns viendrent de nuyt ... et enporterent nos biens et nos chateux ovesque'), which he must have considered as a ground of excuse.

The case in 29 Ass. is instructive in another way, because it shows a very clear understanding of the effect of mora[2], and because it further shows that the ordinary liability of the pawnee did not go as far in early English law as it did in Germanic law (see above, p. 201).

As to Southcote's case (4 Rep. 83b.; Cro. Eliz. 815) it seems to have turned more upon a question of interpretation than upon a liability imposed by law. As Powell J. says in *Coggs* v. *Bernard*, 'the gist of these actions is in the undertaking.' We have seen that in Roman law, a person who promises custodia, being already bound to ordinary diligence, becomes liable for any loss not arising from vis major, and the question in Southcote's case seems to have been, whether an undertaking *to keep* goods is to be taken as an undertaking to keep them *safely*, in other words as a promise of custodia. It must be admitted that there are some expressions in

[1] The passage from Bracton, quoted in part by Mr. Holmes (Common Law, Engl. ed., p. 175), gives no intelligible sense. Lord Holt evidently thought that Bracton meant to follow Justinian. The passage is referred to in Mr. Scrutton's article in this Review, vol. i. p. 436.

[2] See also the remarks on this subject in 4 Rep. 836, and Lord Holt's remarks in 1 Sm. L. C. on p. 213.

Croke's report of the case which cannot be quite reconciled with this interpretation, and there are certainly cases in which it is said that the bailee is liable because he has a remedy over; but neither Southcote's case, nor the few dicta in the Year Books, would be sufficient to establish a theory which is in contradiction with so many other facts. It is therefore submitted that, in English law as in German law, the liability of a bailee was dependent upon the facts of reward, or guilt, or the bailee's special calling.

As to the law of the present day, it is outside of the scope of this paper to dwell upon it. If one word of criticism be allowed, I venture to think that the letter, as distinguished from the spirit of the older law, has been too closely adhered to. In Roman law, as in German law, persons entrusted with semi-public functions or professing any special aptitude were subjected to a more stringent liability; we have retained all these rules, but we have not extended them. The 'dominus horreorum' was in a certain sense the banker of ancient Rome, but in our days a banker is simply looked upon as an unrewarded depositarius, and made liable for gross negligence only [1].

Another question which deserves consideration, touches the restrictions imposed upon railway companies, as to their power of removing their liability by contract [2]. Though these restrictions do not go as far as they do in some other countries, they establish a striking inconsistency in the law, as ship-owners are under no similar obligation, and instead of protecting the public against a monopoly, they give the companies in some cases a fresh monopoly —the privilege of insurance.

There are many other similar points which might be mentioned, showing that the comparative study of the law of bailments ought to have a practical as well as an historical interest.

ERNEST SCHUSTER.

[It will be observed that the Roman *custodia*, in the stricter sense, precisely answers to the responsibility imposed by the Common Law on owners of dangerous things; see pp. 52, 57 above, in the January Number.—ED.]

[1] *Giblin* v. *M'Mullin*, L. R. 2 P. C. 317.

[2] The uncertainty of the effect of s. 7 of the Railway and Canal Traffic Act is illustrated by *Brown* v. *Manchester and Sheffield Ry. Co.*, 8 App. Cas. 703. The decision of the H. L. reverses the unanimous judgment of the Court of Appeal.

THE COPYRIGHT QUESTION.

THE present condition of this most important question shows some advance as compared with the preceding year.

It may be stated with some degree of confidence that it has emerged from its theoretical and debateable stage, and has reached that of the practical adaptation of the written law to the wants and wishes of those most properly interested; that is to say, authors, lecturers, artists, dramatists, and musicians.

The objects of this summary are to show—

1. What has been done to bring the matter to its present state.

2. What may be reasonably hoped for in the immediate future.

The work has been carried on in three, or rather four, principal channels; what has now to be done is to combine the results.

1. The Incorporated Society of Authors and the Copyright Association—which latter may be taken to represent more especially the publishers—have been working upon models of Bills for introduction into the Legislature here.

2. The International Conference at Berne has this year, in its second session, arrived at a Report and recommendations which may be taken to express the wishes and wants of foreign and continental authors and publishers.

3. The United States have manifested, at their recent assemblies of authors and others, a substantial desire to practically acknowledge the grievances of foreign authors, and to extend to them the protection of copyright, at present only enjoyed by citizens of the United States.

4. At the same time the English Foreign Office has, by allowing a certain representation of this country at Berne, and by making arrangements with the Board of Trade with a view to the bringing in of a Bill to consolidate and amend the English Law of Copyright, shown a disposition to aid in putting the matter into a definite and practical form.

To return to the first head. The most formidable task—the accomplishment of which however is an indispensable antecedent to the realization of any practical international arrangement—was the preparation of a Bill consolidating and reducing to something like order the provisions of the mass of existing statutes, the irregular growth of nearly two centuries.

For this purpose there was available in the first place the voluminous Blue Book containing the evidence, and that giving the Report of the Copyright Commission (the latter dated the 24th of May, 1878), to which is attached a Digest of the Law of Copyright prepared by Sir James Stephen according to his views thereon.

It is then clearly needful to adopt and incorporate into any new Bill the views of the majority of the Commission, the Blue Book forming at once a record of all that it seems possible to have said or thought upon the subject, and containing some materials for a codification of the law.

There existed in draft two general Bills of considerable merit—one prepared under the auspices of Lord John Manners; the other introduced by Mr. Hastings in 1883—this will probably be reintroduced; while the draft of a separate Bill on Artistic Copyright had reached a comparatively complete stage.

The work of the draftsman, however, could not be confined to summarizing the law and jurisprudence; the representatives of every branch had to be consulted; for it is needless to say, with the vast increase and development of what may without impropriety be called literary and artistic copyright business, many branches of literary property hitherto of comparatively small value have risen into prominence and assumed hitherto unknown importance.

At the same time, while the future has to be provided for, the immense amount of literary property already under the protection of the existing laws must be assured and maintained, even if the procedure applicable to all may receive some modifications; and in no case could the periods of already-accrued rights be curtailed.

The later prints of the Draft prepared under the direction of Mr. Field, on behalf of the Incorporated Society of Authors, will form, it is confidently hoped, a practical basis for a Bill; while from the many promises of support and expressions of approval from members of all political parties, it might fairly be anticipated that, once introduced with the support of the Government, a consolidating Bill ought speedily to pass.

Some idea of the phases through which the discussion has passed may be gathered from the following extracts from the correspondence respecting the formation of an International Copyright Union.

'No. 32.

Mr. Calcraft to Sir J. Pauncefote.—(Received December 3.)

SIR, *Board of Trade, London, December 2, 1884.*

Referring to your communication of the 22nd October, relative to the proceedings of the recent International Copyright Conference of Berne,

and asking that Earl Granville may receive the opinion of this Board as to the course it may be advisable for Her Majesty's Government to pursue in the matter, I am directed by the Board of Trade to request that the following reply may be laid before his Lordship.

The Board of Trade have carefully considered the important question raised by the suggestion of an amendment of the existing English Copyright Law with the object of placing this country in a position to enter into any Copyright Convention which the various States represented at the Conference, or some of them, may ultimately agree to join.

While the Board of Trade are fully alive to the present unsatisfactory state of the English Copyright Law, they must, at the same time, recognize that collateral points of a disputable character are involved in any attempted legislation of this nature.

It is apparent that the proposals of the Conference go far beyond any mere amendment of the Law by a repeal of those minor requirements touching registration, deposit of copies, and translations.

The suggestion, for instance, that throughout the Union there shall be one uniform period for the duration of copyright, extending a specified period beyond the author's life, raises a serious question of principle. Although the suggestion is one favoured by the Royal Commission on Copyright, the Board of Trade think the proposal would lead to prolonged discussion.

There is, however, a further and still more important consideration which induces the Board of Trade to hesitate before initiating any legislation. This is the non-participation of the United States' Government in the propositions of the Conference, and the probability that the terms of the Convention will contain stipulations of a nature unacceptable to that Government.

The Board of Trade are therefore disposed to think it very unadvisable, in view of the extreme importance of American copyright to English authors, and the negotiations still pending with the United States' Government, *that any steps should at this time be taken to alter the English Law*, and they would certainly at present advise the avoidance of any course which would commit Her Majesty's Government to any legislation with regard to copyright.

I have, &c.

(Signed) HENRY G. CALCRAFT.'

'No. 65.

Mr. Calcraft to Sir J. Pauncefote.—(Received December 18.)

SIR, *Board of Trade, London, December* 18, 1885.

I am directed by the Board of Trade to acknowlege the receipt of your letter on the 3rd instant, transmitting a proof of the papers on the subject of Copyright which Lord Salisbury proposes to lay before Parliament at the commencement of next Session.

In reply, I am to state, for the information of the Secretary of State, that the Board of Trade agreed with his Lordship's proposal that the papers in question should now be made public.

I am further directed to state that the Board of Trade have very carefully considered the whole matter, and are strongly of opinion that the present opportunity should not be lost for putting the Copyright question on a more satisfactory footing, and that, as legislation is necessary to enable this country to become a party to the proposed International Copyright Union, the Board of Trade will be prepared to submit a Bill to Parliament embodying the necessary changes in the present Law.

The Board of Trade further consider that it is of such importance that foreign countries should be enabled clearly to understand what the Law of Copyright is in this country, that they think it will be most desirable, if the circumstances of the Session admit of it, to take the opportunity of codifying the present Copyright Law in the Bill which they hope to introduce into Parliament at an early date.

I have, &c.

(Signed) HENRY G. CALCRAFT.'

The general objects of the Berne Conference are well expressed in the circular addressed by the President of the Swiss Federal Council, in the name of the Confederation, to the European powers on December 3, 1883. The adjoined extract will show the drift of that circular:—

'It would certainly be a great gain to agree at present to a general understanding by which the higher principle, and, as it were, the natural right, should be proclaimed, that the author of a literary or artistic work, no matter what may be his nationality, or the place of reproduction, ought to be protected everywhere equally with natives of each State.

This fundamental principle, which does not interfere with any existing Convention, once admitted, and the general Union constituted on this basis, it is beyond doubt that, under the influence of the exchange of views which would be established between the States of the Union, the startling differences which exist in international law would be, by degrees, removed, to give place to a more uniform and, consequently, more certain régime for authors and their legal representatives.'

The minutes of the Conferences held at Berne in 1884 and 1885 show that the subject has been considered there under most if not all of its aspects. No dissent seems ever to have been expressed as regards the general principles of literary property, nor as to the recognition which each country by its municipal law should extend to literary and artistic matter, produced by the subjects of other countries. All the representatives seem to have agreed upon the

adoption of the principle of reciprocity, already in full force between many of the states represented at the Conference.

Some differences arose as to whether or no certain classes of literature should be protected, but finally it seems to have been conceded that whatever has taken a literary form, whether its basis be scientific or educational, should receive full protection.

Naturally the all-important question of the duration of copyright—which differed, or rather differs—in many countries, was one of those most fully debated. It is unnecessary to go into these discussions: suffice it to say that the period accepted by all, for future works, is the life of the author and thirty years after the termination of the year of his death. In this view the English bodies before mentioned have also concurred. Uniformity in this respect is of course, to a certain extent, a necessity as a basis for legislation intended to grant to the foreigners in this country equal rights to those conceded to the British authors in countries adopting the conclusions of the Berne Conference.

I am disposed to agree with the remark of Messrs. Adams and Bergne (the English representatives at the Conference) that the Conference had gone too much into detail. Even now it is to be feared that, in so far as the conclusions of the Conference are based upon the very indefinite substructure of so-called International Law, they will help us but little in our municipal legislation.

The conventions as set forth in Orders in Council will after all only take effect by giving to the author domiciled and publishing in one of the states parties to the International Copyright Convention similar rights to those possessed by British subjects under their own law. It will of course be better that the protection in each case should be as far as possible of a similar kind; but I think it would have been, and will be, unwise to push reciprocity to the extent of limiting the protection given by each state to the exact quantum of that given by the state whereof the foreigner is a subject. The measure and duration of the right in the British dominions should be that given to the British subject under like circumstances. Fortunately this need not now be discussed, but in the case of the United States it may yet have to be considered.

The writer has reason to insist upon the point that the rights of British subjects as to copyright in Great Britain and the Colonies should not rest upon the provisions of any convention, but arise out of distinct provisions in our own law; i.e. a British subject publishing anywhere should have copyright in the British dominions. This would probably not be secured to him under the Berne Convention, which contemplates protection in other states to copyright obtained by subjects of states belonging to the Union,

who publish in and according to the laws of their respective countries.

The text of the translation of the conclusions of the Berne Conference is printed at the end of these notes.

We now come to the branch of the subject most important to British authors, viz. some arrangement with the United States. On the conclusion of the last session of the Berne Conference, we find that the representative of the United States expressed himself in a favourable sense. I extract from Correspondence, p. 55, report of Messrs. Adams and Bergne:—

'13. *The United States.*

Conformably to your Lordship's instructions, we have given special attention to the bearing which the draft Convention might have upon any negotiations between Great Britain and the United States.

The American Minister at Berne attended the sittings of the Conference in a consultative capacity, but did not take any part in the proceedings, nor vote on any question. We beg, however, to draw your Lordship's especial attention to the very important statement made by him at the fifth meeting of the Plenary Conference. In this statement Mr. Winchester, after explaining the nature of his functions as United States Delegate, made the following declaration on behalf of his government:—

"I believe that the United States government is kindly disposed in principle towards the proposition that the author of a literary or artistic work, whatever be his nationality and whatever the place of reproduction, should be everywhere protected on the same footing as the citizens and subjects of each nation."

In view of this statement, we do not think that there can be any ground for the apprehension which has been expressed in some quarters, that an immediate amendment of English law, with the view to the entry of Great Britain into the projected Union, would have a prejudicial effect in regard to any copyright negotiations with the United States.

In fact, from the friendly interest in the objects of the Conference which has been expressed by the United States Delegate, we are justified in anticipating that when once the Union has been formed, and has been acceded to by the more important European countries, the United States will before long feel it difficult to abstain from becoming a party to it also. But if this hope should not be shortly realized, we submit that a moderate and well-considered amendment of English law would furnish an additional incentive to the United States to conclude a separate Copyright Convention with Great Britain, the negotiation of which would be greatly facilitated by placing the British Statutes on a more intelligible basis, and by removing restrictions and formalities which are inconsistent with modern views, and with the general practice of the civilized world.'

But it may be easily imagined that if the probability of action on the part of the United States rested upon the goodwill of the

Government alone, any hope that the long delay which has already taken place would speedily be put an end to, would rest on no very sure foundation.

We learn however from the *Times*, Jan. 30, 1886, that a Committee of the Senate, to which had been referred two Bills, one introduced by Senator Hawley at the request of the Copyright League, another by Senator Chace, commenced on the 28th of January the hearing of arguments upon the question.

Mr. Hawley's Bill is as follows:—

'Citizens of foreign countries, of which the laws, treaties, or conventions confer, or shall hereafter confer, upon the citizens of the United States rights of copyright equal to those accorded to their own citizens, shall have in the United States rights of copyright equal to those enjoyed by the citizens of the United States.

That this Act shall not apply to any book or other subject of copyright published before the date hereof.

That the laws now in force in regard to copyright shall be applicable to the copyright hereby created, except so far as the laws are hereinafter amended or repealed.'

The text of Mr. Chace's Bill seems not to have been published in England, but it appears to aim at the protection of printers and publishers by providing that books entitled to copyright should be *printed* in the United States.

Mr. Welsh, president of the Philadelphia Typographical Union, on behalf of the printers, is said to have stated that the introduction of such a provision into Mr. Hawley's Bill would be satisfactory to the labour societies.

The further progress of the matter depends then on the following events:—

(1) The conclusion of the Berne Conference by the protocolization of an International Convention.

(2) The passing of an Act by the British Parliament enabling the Queen to adhere to that Convention, this Act to be either a complete codification of the law, or merely an addition to the International Copyright Acts of 7 & 8 Vict. c. 12, and 15 & 16 Vict. c. 12.

(3) The passing of an Act by the United States under which they would join the International Union, or would be in a position to enter into a convention with this country.

E. M. Underdown.

APPENDIX.

(Translation.)

Final Act of the Second International Conference for the Protection of Literary and Artistic Works.

The Undersigned, Delegates of the Governments of Germany, Spain, France, Great Britain, Haïti, Honduras, Italy, the Netherlands, Sweden and Norway, Switzerland, and Tunis, empowered to take part in the second International Conference for the protection of literary and artistic works, which met at Berne the 7th September, 1885, having terminated their labours, submit to the Governments of the countries they represent the draft Convention, with Additional Article and Final Protocol, of which the following is the text:—

I.—*Convention concerning the creation of an International Union for the Protection of Literary and Artistic Works.*

[Enumeration of the High Contracting Parties]

being equally animated by the desire to protect effectively, and in as uniform a manner as possible, the rights of authors over their literary and artistic works,

Have resolved to conclude a Convention to that effect, and have named for their Plenipotentiaries, that is to say:—

Who, having communicated to each other their respective Full Powers, found in good and due form, have agreed upon the following Articles:—

ARTICLE 1.—The Contracting States are constituted into an Union for the protection of the rights of authors over their literary and artistic works.

ARTICLE 2.—Authors of any of the countries of the Union, or their lawful representatives, shall enjoy in the other countries for their works, whether published in one of those countries or unpublished, the rights which the respective laws do now or may hereafter grant to natives.

The enjoyment of these rights is subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work, and cannot exceed in the other countries the term of protection granted in the said country of origin.

The country of origin of the work is that in which the work is first published, or if such publication takes place simultaneously in several countries of the Union, that one of them in which the shortest term of protection is granted by law.

For unpublished works the country to which the author belongs is considered the country of origin of the work.

ARTICLE 3.—The stipulations of the present Convention apply equally to the publishers of literary and artistic works published in one of the countries of the Union, but of which the authors belong to a country which is not a party to the Union.

ARTICLE 4.—The expression 'literary and artistic works' comprehends books, pamphlets, and all other writings; dramatic or dramatico-musical

works, musical compositions with or without words; works of design, painting, sculpture, and engraving; lithographs, illustrations, geographical charts; plans, sketches, and plastic works relative to geography, topography, architecture, or science in general; in fact, every production whatsoever in the literary, scientific, or artistic domain which can be published by any mode of impression or reproduction.

ARTICLE 5.—Authors of any of the countries of the Union, or their legal representatives, shall enjoy in the other countries the exclusive right of making or authorizing the translation of their works until the expiration of ten years from the publication of the original work in one of the countries of the Union.

For works published in incomplete parts ('livraisons') the period of ten years commences from the date of publication of the last part of the original work.

For works composed of several volumes published at intervals, as well as for bulletins or collections ('cahiers') published by literary or scientific Societies, or by private persons, each volume, bulletin, or collection is, with regard to the period of ten years, considered as a separate work.

In the cases provided for by the present Article, and for the calculation of the period of protection, the 31st December of the year in which the work was published is admitted as the date of publication.

ARTICLE 6.—Authorized translations are protected as original works. They consequently enjoy the protection stipulated in Articles II and III as regards their unauthorized reproduction in the countries of the Union.

It is understood that, in the case of a work for which the translating right has fallen into the public domain, the translator cannot oppose the translation of the same work by other writers.

ARTICLE 7.—Articles from newspapers or periodicals published in any of the countries of the Union may be reproduced in original or in translation, unless the authors or publishers have expressly forbidden it. For periodicals it is sufficient if the prohibition is made in a general manner at the beginning of each number of the periodical.

This prohibition cannot in any case apply to articles of political discussion, or to the reproduction of news of the day or *current topics*.

ARTICLE 8.—As regards the liberty of extracting portions from literary or artistic works for use in publications destined for educational or scientific purposes, or for chrestomathies, the matter is to be decided by the legislation of the different countries of the Union, or by special arrangements existing or to be concluded between them.

ARTICLE 9.—The stipulations of Article II apply to the public representation of dramatic or dramatico-musical works, whether such works be published or not.

Authors of dramatic or dramatico-musical works, or their legal representatives, are, during the existence of their exclusive right of translation, equally protected against the unauthorized public representation of translations of their works.

The stipulations of Article II apply equally to the public performance of unpublished musical works, or of published works in which the author has expressly declared on the title-page or commencement of the work that he forbids the public performance.

ARTICLE 10.—Unauthorized indirect appropriations of a literary or artistic

work, of various kinds, such as *adaptations, arrangements of music*, &c., are specially included amongst the illicit reproductions to which the present Convention applies, when they are only the reproduction of a particular work, in the same form, or in another form, with non-essential alterations, additions, or abridgments, so made as not to confer the character of a new original work.

It is agreed that, in the application of the present Article, the Tribunals of the various countries of the Union will, if there is occasion, conform themselves to the provisions of their respective laws.

ARTICLE 11.—In order that the authors of works protected by the present Convention shall, in the absence of proof to the contrary, be considered as such, and be consequently admitted to institute proceedings against pirates before the Courts of the various countries of the Union, it will be sufficient that their name be indicated on the work in the accustomed manner.

For anonymous or pseudonymous works, the publisher whose name is indicated on the work is entitled to protect the rights belonging to the author. He is, without other proof, reputed the legal representative of the anonymous or pseudonymous author.

It is, nevertheless, agreed that the Tribunals may, if necessary, require the production of a certificate from the competent authority to the effect that the formalities prescribed by law in the country of origin have been accomplished, as contemplated in Article 2.

ARTICLE 12.—Pirated works may be seized on importation into those countries of the Union where the original work enjoys legal protection.

The seizure shall take place conformably to the domestic law of each State.

ARTICLE 13.—It is understood that the provisions of the present Convention cannot in any way derogate from the right belonging to the Government of each country of the Union to permit, to control, or to prohibit, by measures of domestic legislation or police, the circulation, representation, or exhibition of any works or productions in regard to which the competent authority may find it necessary to exercise that right.

ARTICLE 14.—Under the reserves and conditions to be determined by common agreement, the present Convention applies to all works which at the moment of its coming into force have not yet fallen into the public domain in the country of origin.

ARTICLE 15.—It is understood that the Governments of the countries of the Union reserve to themselves respectively the right to enter into separate and particular arrangements between each other, provided always that such arrangements confer upon authors or their legal representatives more extended rights than those granted by the Union, or embody other stipulations not contrary to the present Convention.

ARTICLE 16.—An international office is established, under the name of 'Office of the International Union for the Protection of Literary and Artistic Works.'

This Office, of which the expenses will be borne by the Administrations of all the countries of the Union, is placed under the high authority of the Superior Administration of the Swiss Confederation, and works under its direction. The functions of this Office are determined by common accord between the countries of the Union.

ARTICLE 17.—The present Convention may be submitted to revisions in order to introduce therein amendments calculated to perfect the system of the Union.

Questions of this kind, as well as those which are of interest to the Union in other respects, will be considered in Conferences to be held successively in the countries of the Union by Delegates of the said countries.

It is understood that no alteration in the present Convention shall be binding on the Union except by the unanimous consent of the countries composing it.

ARTICLE 18.—Countries which have not become parties to the present Convention, and which grant by their domestic law the protection of rights secured by this Convention, shall be admitted to accede thereto on request to that effect.

Such accession shall be notified in writing to the Government of the Swiss Confederation, who will communicate it to all the other countries of the Union.

Such accession shall imply full adhesion to all the clauses and admission to all the advantages provided by the present Convention.

ARTICLE 19.—Countries acceding to the present Convention shall also have the right to accede thereto at any time for their Colonies or foreign possessions.

They may do this either by a general declaration comprehending all their Colonies or possessions within the accession, or by specially naming those comprised therein, or by simply indicating those which are excluded.

ARTICLE 20.—The present Convention shall be put in force three months after the exchange of the ratifications, and shall remain in effect for an indefinite period until the termination of a year from the day on which it may have been denounced.

Such denunciation shall be made to the Government authorized to receive accessions, and shall only be effective as regards the country making it, the Convention remaining in full force and effect for the other countries of the Union.

ARTICLE 21.—The present Convention shall be ratified, and the ratifications exchanged at , within the space of one year at the latest.

In witness whereof, &c.

Done at , the .

II. *Additional Article.*

The Plenipotentiaries assembled to sign the Convention concerning the creation of an International Union for the protection of literary and artistic works have agreed upon the following Additional Article, which shall be ratified together with the Convention to which it relates:—

The Convention concluded this day in no wise affects the maintenance of existing Conventions between the Contracting States, provided always that such Conventions confer on authors, or their legal representatives, rights more extended than those secured by the Union, or contain other stipulations which are not contrary to the said Convention.

In witness whereof, &c.

Done at , the .

III.—*Final Protocol.*

In proceeding to the signature of the Convention concluded this day, the undersigned Plenipotentiaries have declared and stipulated as follows:—

1. As regards Article IV, it is agreed that those countries of the Union where the character of artistic works is not refused to photographs, engage to admit them to the benefits of the Convention concluded to-day, from the date of its coming into effect. They are, however, not bound to protect the authors of such works further than is permitted by their own legislation, except in the case of international engagements already existing, or which may hereafter be entered into by them.

It is understood that an authorized photograph of a protected work of art shall enjoy legal protection in all the countries of the Union, as contemplated by the said Convention, for the same period as the principal right of reproduction of the work itself subsists, and within the limits of private arrangements between those who have legal rights.

2. As regards Article IX, it is agreed that those countries of the Union whose legislation implicitly includes chorégraphic works amongst dramatico-musical works expressly admit the former works to the benefits of the Convention concluded this day.

It is, however, understood that questions which may arise on the application of this clause shall rest within the competence of the respective Tribunals to decide.

3. It is understood that the manufacture and sale of instruments for the mechanical reproduction of musical airs which are copyright, shall not be considered as constituting an infringement of musical copyright.

4. The common agreement alluded to in Article XIV of the Convention is established as follows:—

The application of the Convention to works which have not fallen into the public domain at the time when it comes into force, shall operate according to the stipulations on this head which may be contained in special Conventions either existing or to be concluded.

In the absence of such stipulations between any countries of the Union, the respective countries shall regulate, each for itself, by its domestic legislation, the manner in which the principle contained in Article XIV is to be applied.

5. The organization of the International Office established in virtue of Article XVI of the Convention shall be fixed by a Regulation which will be drawn up by the Government of the Swiss Confederation.

The official language of the International Office will be French.

The International Office will collect all kinds of information relative to the protection of the rights of authors over their literary and artistic works. It will arrange and publish such information. It will study questions of general utility likely to be of interest to the Union, and, by the aid of documents placed at its disposal by the different Administrations, will edit a periodical publication in the French language treating questions which concern the Union. The Governments of the countries of the Union reserve to themselves the faculty of authorizing, by common accord, the publication by the Office of an edition in one or more other languages if experience should show this to be requisite.

The International Office will always hold itself at the disposal of members of the Union, with the view to furnish them with any special information they may require relative to the protection of literary and artistic works.

The Administration of the country where a Conference is about to be held, will prepare the programme of the Conference with the assistance of the International Office.

The Director of the International Office will attend the sittings of the Conferences, and will take part in the discussions without a deliberative voice. He will make an annual Report on his administration, which shall be communicated to all the members of the Union.

The expenses of the Office of the International Union shall be shared by the Contracting States. Unless a fresh arrangement be made, they cannot exceed a sum of 60,000 fr. a-year. This sum may be increased by the decision of one of the Conferences provided for in Article XVII.

The share of the total expense to be paid by each country shall be determined by the division of the contracting and acceding States into six classes, each of which shall contribute in the proportion of a certain number of units, viz. :—

First Class. . .	25 units.	Fourth Class . .	10 units.
Second „ . . .	20 „	Fifth „ . . .	5 „
Third „ . . .	15 „	Sixth „ . . .	3 „

These coefficients will be multiplied by the numbers of States of each class, and the total product thus obtained will give the number of units by which the total expense is to be divided. The quotient will give the amount of the unity of expense.

Each State will declare at the time of its accession, in which of the said classes it desires to be placed.

The Swiss Administration will prepare the Budget of the Office, superintend its expenditure, make the necessary advances, and draw up the annual account, which shall be communicated to all the other Administrations.

6. The next Conference shall be held at , in [1].

7. It is agreed that, as regards the exchange of ratifications contemplated in Article XXI, each Contracting Party shall give a single instrument, which shall be deposited, with those of the other States, in the Government archives of the Swiss Confederation. Each party shall receive in exchange a copy of the *procès-verbal* of the exchange of ratifications, signed by the Plenipotentiaries present.

The present Final Protocol, which shall be ratified with the Convention concluded this day, shall be considered as forming an integral part of the said Convention, and shall have the same force, effect, and duration.

In witness whereof, &c.

Done at , the .

The undersigned Delegates request the Swiss Federal Council to be so good as to take the necessary steps to invite the Governments represented at the Conference to transform the above project into a definitive Convention, at a diplomatic Conference to be held within the delay of one year.

They further suggest that the project should, with the same object, be also communicated by the Swiss Federal Council to the Governments of the countries not represented at the Conference.

[1] [Berne, September, 1886.]

In witness whereof, the respective Delegates have drawn up the present final *procès-verbal*, and have affixed thereto their signatures.

Done at Berne, the 18th September, 1885, in a single instrument, which shall be deposited in the archives of the Swiss Confederation.

(Signed)

REICHARDT.
MEYER.
DAMBACH. } Germany.

COMTE DE LA ALMINA.
MANUEL TAMAYO Y BAUS. } Spain.

EMM. ARAGO.
LOUIS ULBACH.
RENÉ LAVOLLÉE.
L. RENAULT. } France.

F. O. ADAMS.
J. H. G. BERGNE. } England.

LOUIS JOSEPH JANVIER. Haiti.

WEDER.
FÉ. } Honduras.

A. ENRICO ROSMINI.
REMIGIO TRINCHERI. } Italy.

B. L. VERWEY. Holland.

ALF. LAGERHEIM. Sweden.

F. BÆTZMANN. Norway.

L. RUCHONNET.
DROZ.
A. D'ORELLI. } Switzerland.

L. RENAULT. Tunis.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

Criminalité et Répression. Essai de Science Pénale, par ADOLPHE PRINS. Bruxelles: Librairie Européenne, C. Muquardt. 1886. 8vo. 202 pp.

THE author of this work treats of a subject which for many years was, with short intervals, incessantly under discussion in England, but which has now so far dropped out of sight that no great interest can be aroused by theoretical essays on it.

This may be because we find reason to believe that our penal and repressive systems are founded on correct principles, that we have got into the right groove, and think it is only necessary to develop and improve our present practice, in order to ensure a continuance of the results already achieved, until the great diminution in crime, which has characterized past years, has brought it down to an 'irreducible minimum.' There are many other countries, however, which have by no means arrived at such an encouraging stage, for reasons which are not difficult to discover; and the author wishes to revive the attention of legislators to these questions, by a scientific study of them, without pretending to approach them from the side of practical experience.

He naturally first sets himself to consider the causes of crime and who are the criminals, and enunciates the opinion that they are the product of our social condition. After pointing out how all the facts of life are governed by law, he observes:—'La criminalité a la même apparence; sous l'inextricable enchevêtrement des infractions on démêle la loi de la criminalité. Il n'existe pas un type abstrait de l'homme moral et un type abstrait du coupable; le crime n'est pas un phénomène individuel, mais un phénomène social. La criminalité sort des éléments même de l'humanité; elle n'est pas transcendante mais immanente; on peut voir en elle une sorte de dégénérescence de l'organisme social. . . . L'homme appartient à l'humanité comme l'atome à la matière; le délinquant et l'honnête homme se rattachent l'un et l'autre à leur milieu. Il y a un milieu social favorable à la santé morale: le penchant au crime y est presque nul; il y a un milieu social où l'atmosphère est corrompue, où les éléments malsains s'amoncellent, où les plus vigoureux dépérissent, où la criminalité s'abat comme la moisissure sur le fumier: le penchant au crime y est formidable, et l'on peut dire en ce sens qu'il est un fait social avec une cause sociale, et qu'il est en connexion intime avec une organisation sociale donnée.'

He seems rather to hold that the defective organisation of labour, which abandons the 'lower classes' to chance, and takes no pains to supervise the training of the workman's children, is responsible for the development of 'social anæmia,' which leads to crime. In the poor, low, savage quarters of great towns, where no light of moral or physical well-being penetrates, are to be found the 'déshérités.' 'Ils entrevoient l'éclat du luxe pour le haïr; ils

ne respectent ni la propriété ni la vie, parce que ni la vie, ni la propriété, n'ont pour eux de valeur réelle; ils naissent, s'étiolent, luttent et meurent sans soupçonner que, pour certaines gens, l'existence est un bonheur, la propriété un droit, la vertu une habitude, et le calme un état constant. Tel est le foyer naturel et fatal de la criminalité.'

Those who live in such an atmosphere, he says, develop criminal tendencies, as surely as those who live in unhealthy undrained quarters, with bad water, and insufficient food, develop epidemics. The children form the recruits of the army of crime, and this army is increased by immigration from the country, for which by some process of reasoning the author blames the governments, as having neglected the country for the town.

The workman, the author says, is always on the borders of vagabondage; the vagabond always on the borders of crime; a statement which surely contains too sweeping a generalization. In this manner are developed the criminal classes, as distinguished from accidental criminals, and the distinction between them, he truly says, is most important. To those who belong to the criminal class, crime is the natural, habitual tendency, obeyed mechanically when circumstances suggest it; without any express intentions, but as in the ordinary course, just as those who are not criminal, without thinking, mechanically and unconsciously, follow the social rules of honesty and self-restraint. The criminal classes have even their own public opinion, which supports and encourages them, and confers on the heroes among them a certain coveted popularity.

Without agreeing with all the theories thus set out, and especially with that which attributes to Government such a power of regulation as would be fatal to the individual energy which alone can ensure development and progress, it may be admitted that there is much in the foregoing views which may be well laid to heart.

It is likely enough that the classes for whom the author appeals to our sympathies, and to our sense of justice, by calling them the 'disinherited,' are themselves originally to blame for the condition they have got into. Idleness and love of pleasure (which includes intemperance) are at the bottom of most of the misfortunes which lead a person into the ranks of the 'disinherited;' improvidence and mental or bodily incapacity bring others there. These become criminal, not from absolute want of the necessaries of life, but because their desire for the gratification of their appetites, whatever they may be, is strong while their willingness to endure labour is weak; so that they set themselves to obtain the results of labour, in the only way it is possible to do without it, by stealing, or plundering of some sort.

The children who are bred up by parents such as these, who suffer for the sins of their fathers 'unto the third and fourth generation,' may well indeed be the objects of unmitigated sympathy, and of the careful guardianship of society; a version of socialism which, much more than State regulation of labour, is likely to be approved in our country.

There is no doubt considerable confusion between cause and effect in the theories, which attribute to unwholesome, crowded, inferior dwellings any great share in *creating* the class of habitual criminals. These are to be found in such dwellings no doubt; but this is because the habitual criminal is generally an idler by nature, and so a wretchedly poor man. A case in point occurs to illustrate this while these lines are being written. The police a few days ago arrested some coiners. They found them in a wretched, small, ill-furnished room, in a street which formerly bore the significant name 'Cut Throat Lane,' but is now called Corporation Row, Clerkenwell. In a small room they found nine persons sleeping in one bed, and three in

another, men, women, and a boy, all promiscuously huddled up under a single counterpane. In the cupboard was their wealth in the shape of false coin.

It would be absurd to say that the criminal profession of these people was in any way due to the place they lived in; rather it should be said that coining procures such a precarious livelihood that those who follow it cannot afford much for house-rent; and it is clear that those who adopt that line choose it because it secures to them an easier way of getting money than by working hard for it.

The disadvantage of the nests of low dwellings, which exist in most old cities, lies in the facilities they give to the formation and growth of little criminal communities, which foster and encourage crime, developing a public opinion which will not accept the laws by which society is held together, and the well-being of the community at large advanced. Those who live in them are necessarily the poorest, and among them are many whose poverty comes from idleness, and who prefer the sudden gains of a criminal life to steady labour and self-restraint. These give the tone to the whole, for as they are out of view of the community at large, they do not come under its influence. The little narrow streets and courts can have but little supervision from the police, and the moral soil and surroundings are not favourable to the influence of those who might go among them, to try and inculcate the moral virtues.

Criminals in general take very little blame for their crimes. Even those who have been convicted on clear evidence, and sentenced, generally contrive to persuade themselves and each other, in some way or another, that they are suffering wrongfully, and that if anybody was in fault it wasn't them, or at most, they are unfortunate. In these criminal communities, therefore, it is certain that the laws of property are not looked at in the same light as elsewhere in civilized lands; though perhaps their ideas do not differ much from those of the typical oriental governments.

To them the rights of property seem only artificial restrictions on obtaining something which they desire, and can get easily, by simply taking it. The only way to check the habits founded on these ideas, and to prevent children being reared up under the influence of these surroundings, is to break up the communities themselves, by destroying the places in which they live, and so force the members of it to mix in a more wholesome atmosphere.

There can be no doubt among those who are practically acquainted with the subject, that a large proportion of the criminal classes are more or less mentally deficient. This deficiency may arise from low brain power, taking the form of inability to recognize the necessity for, or advantage of, laws for the protection of the community, or from that want of balance between the impulses and the power of resisting them, which seem to have received the name of 'neurasthénie morale;' a condition which is held to differ from madness only by reason that in the latter the power of resistance to impulses is totally absent.

Further, among the alleged causes of, or encouragements to crime, and the exterior circumstances which lead to different classes of crime, must be noticed the influence of climate, of price of necessaries of life, and heredity, which is generally difficult to distinguish from bringing up, but which is probably included among mental and physical causes, as it is generally the origin of them. A great deal of curious information is given as to the social condition of different communities in ancient and more recent times; the systematic vagabondage which sometimes existed, the anarchy which the gangs of vagabonds were always ready to foment, and the course adopted in various

ages to combat the tendencies to social disorder, and promote the security of property which is the foundation of the well-being of the community.

The author looks upon the criminal classes as the survival and representatives of the imperfect civilization of former days, when might was right, and society badly organized: and he conclusively rejects any inference from the theories above referred to, which would limit the right of society to punish breaches of its laws; for he says society may oppose and combat criminals by the same right as it does tigers; and so far as concerns those who err from 'neurasthénie morale,' he sensibly points out that the liability to punishment decides the wavering balance between impulses to do wrong, and power to resist it, by supplying an additional motive to the latter. So that finally the right of society to punish crime is incontestable, but it involves also the duty of doing whatever is possible to prevent it; and just as those who develop the highest type of mental and moral organization receive the reward which belongs partly to their predecessors, so those who belong to the lowest, or criminal organization, must submit to the punishment for the disposition they inherit.

On the whole, in fact, the conclusion as to the right to punish is the same, whether in theory the criminal is or is not wholly responsible; just as the murderer who pleaded the injustice of hanging him, as he was not a free agent in committing the crime, because he was predestined to it, was reminded that he was also predestined to be hanged for it.

The theory of the origin of crime, and the enquiry as to the circumstances which favour its development are, however, of great consequence in the consideration of the means which should be adopted for preventing it. Everything which tends to remove strong temptations conduces to this end. Perhaps no one measure has been more effective to this end than the establishment of banks all over the country, for through their agency people can dispense with the necessity for carrying about large sums of money, or even of keeping them in their houses. Picking pockets has very much gone out of fashion with the habit of carrying valuable silk pocket-handkerchiefs; better lighting and watching of roads and streets make detection more likely and conduce to the same end.

The removal of the young from the evil influence which develops them into criminals has already been mentioned, and in connexion with this it is worthy of consideration whether the outcry so common in some countries against 'récidives,' does not show that a wrong direction is taken in the discussion of the subject. The punishment of an offender has of course the object (among others) of preventing him from offending again, but a much more important object is to deter others, so that the success or failure of any system of prevention or repression should be measured rather by the number of first convictions than of reconvictions. By checking the first we exhaust the supply of the second, and in this as in other affairs prevention is easier than cure.

But this consideration should not lead to any relaxation of the efforts to deter and improve the individuals who thus fulfil the office of examples to deter others, and above all things does not excuse the neglect and mismanagement, which, by indiscriminate and unregulated association of prisoners, night and day, actually develops criminal tendencies, lowers the whole moral tone, and, by placing men for years in a loathsome atmosphere of vice and corruption, sends them forth worse than when convicted, and as fresh centres of criminal infection to prey on the community.

The author discusses various systems which have been in force for regulating the practice of the courts of law in awarding punishment and

defining crimes; varying between the Roman, which left great latitude with the judge; and the exactness of the French Penal Code of 1791, which defined each offence, and assigned to it a precise amount of punishment. If the former system gave more latitude than can reasonably be entrusted uncontrolled to any human being, in dealing with the lives and liberties of his fellow creatures, it is certain that a false theory prompted the enactments of 1791, above referred to; and though our courts are not so rigidly fettered in the amount of their punishments, it may be doubted whether the judges might not fairly be entrusted with more latitude than they now have, for the purpose of combating those ingenious criminals who manage to commit crimes without bringing themselves under the penalties of any specific law.

As regards the amount of punishment which should be inflicted for any crime, various principles have been set forth; some have said that the demands of 'a righteous vengeance' should be the measure, but this affords a very vague uncertain measure; others have said that such punishment should be inflicted as will cure the offender, and deter him from committing the crime again: a theory which, pushed to its logical limit, would lead again to a very free resort to the use of the gallows; others again have proposed that the culprit should be forced, by his labour in prison, to recompense the injured person: a theory which takes no account of practical probabilities, and would lead to the general adoption of penal servitude for life.

The author of this work seems to consider the punishment solely as it affects the criminal, and it is somewhat remarkable that he nowhere refers to a sounder principle than any of these above described, viz. that the amount of punishment should be such as will deter *others*, a measure which can be more easily found by experience than any other, and which may lead to different practice at different times. But no one theory of awarding the amount of punishment can practically be followed to the exclusion of all others; the authority which awards the punishment has to take into account personal and other considerations, such as the degree of culpability and the special effect on the individual; and he must pay some regard to enlightened public opinion while leading and directing it, for public opinion must be enlisted on the side of law and justice. For incorrigibles, whom the author compares to an irrepressible Jack in the Box, which reappears in full vigour immediately restraint is removed, he may reasonably take into account the necessity for protecting society against them, by removing them for a long period from the possibility of carrying on their war against it, and a gap in our preventive system will be filled up when those who are incurably criminal, by reason of mental deficiency, can be restrained by curtailment of the liberty they cannot help abusing. The position occupied by the judge or magistrate in the public esteem is of high importance, and the author refers with high appreciation to the superiority of the English practice in this regard over that which has prevailed in the countries which adopted the French code, and the practice framed by the lawyers who held power during the Revolution of 1791. He compares the number of Judges of the Highest Courts in England, which amounts to 34, all told, with the 800 French councillors who fulfil the same functions; and the 22 Magistrates of Metropolitan Courts, with the 87 who compose the 'tribunal de première instance de la Seine.' Not less remarkable is the comparison between the pay of the judges and justices in the two countries, which vary inversely as the numbers, which has for its consequence that in France and Belgium the justices are neither independent, nor experienced, nor highly respected.

The author points out how entirely modern is the very idea of a penitentiary system, for formerly the only idea of penal treatment consisted of punishment in its original sense of inflicting pain, pure and simple, without any consideration for humanity or reformation.

He discusses the system of confining each prisoner, during the whole of a sentence, extending over many years, in a cell by himself; a system which has been adopted very largely in Belgium, but has been always in opposition to the views and experience of English penal administrators. Here this regimen is enforced only for a few months, and in long sentences is followed by a system of labour in association, prisoners occupying separate cells when sleeping and in the intervals of labour. He attributes the adoption of the Belgian system to a monastic theory of the perfectibility of every man through meditation in solitude, leading to repentance and goodness.

He points out that the Belgian Government commence to doubt the soundness of this system, and certainly his discussion of it should give it the coup de grâce. 'M. Bérenger disait le 22 Mars 1884, au Sénat français: "Nous ne partageons plus les illusions du gouvernement de Juillet sur la vertu de la cellule. On disait alors que la cellule faisait germer dans le cœur le plus corrompu des réflexions salutaires, que l'isolement avait l'heureuse vertu de rendre le condamné meilleur. Nous ne tombons pas dans ces exagérations, mais nous avons la certitude qu'il l'empêche de devenir pire, ce qui est déjà beaucoup. On peut de plus espérer qu'il sera plus accessible aux bonnes influences. Personne n'a la pensée de laisser dégénérer la cellule en une véritable torture, d'en faire un instrument de barbarie; nous ne voulons pas que l'isolement soit trop long, ni qu'il soit absolu. Sur le premier point, la loi de 1875 l'a limité aux peines d'un an au maximum."

'Et M. Herbette, directeur de l'administration pénitentiaire, disait dans la même séance: "Lorsqu'on veut maintenir en cellule un être condamné à des années de solitude, on peut se demander si son activité intellectuelle et son tempérament résisteront assez à une telle épreuve. Toute claustration pouvant produire l'anémie, celle-ci peut provoquer des effets d'autant plus réels, qu'elle sera plus étroite, faisant mouvoir l'homme, non dans l'enceinte d'un atelier ou d'un préau, mais dans cette prison individuelle qu'on nomme la cellule."

'"Un philosophe qui veut créer une œuvre de l'esprit aimera peut-être la solitude, le croyant ou l'ascète s'absorbera dans des méditations religieuses, la brute continuera à végéter. Mais comment espérer que la cellule développe jamais chez le délinquant moyen des tendances morales, ou des instincts sociaux?"' M. Beltrani Scalia says: 'Le régime cellulaire considère l'homme comme un frère de la Trappe.'

He says, in fact, that the cellular system of Belgium does not take sufficient account of the living and acting man. It trains him to a life of contemplation, and then turns him out into the world, less fit to recommence the struggle for existence than when he came into prison. The limitation imposed on the acquisition of, or practice in the knowledge of a trade, which results from the exclusion of all which must be carried on in association or in the open air, constitutes another serious disadvantage in the adoption of the cellular system for long terms; and the author refers also to another consequence which results from this, in the probability that prisoners so trained will prefer to remain in the towns, where they can follow such in-door occupations, instead of returning to the healthier life of the country. In this he holds that the cellular system, carried out as in Belgium, defeats what should be an object of the legislator, namely, to

counteract the tendency to the depopulation of the country, to combat the abandonment of the villages in order to increase the towns. There are many among us who hold that this is the mission of the legislator, and will so far sympathize with the author's objection to the Belgian practice, and his preference for ours, which he supports by numerous weighty and unanswerable reasons.

The author falls into a singular mistake when describing, with approval, the progressive system in force in the United Kingdom, under which the cellular stage of discipline is followed by work in association under supervision, the cell being occupied except when at work, and finally by conditional release. He says that it was first applied in Ireland, under Sir Walter Crofton; a claim which Sir Walter would assuredly be the first to repudiate, because it would deprive some most distinguished prison reformers of the credit due to them; and he certainly has taken among prison reformers a sufficiently high place to be able to dispense with any which is not due to his own merits.

Our system was, in fact, instituted in 1842, when the 'Probation System' was devised, based on the idea of passing convicts through various stages of control and discipline, by which it was hoped a progressive reform would be effected in them, and a desire to do well stimulated, by ensuring that such conduct should be followed by improvement in their condition. Selected men of not more than seven years' sentence were to pass a preliminary period, not exceeding eighteen months, in a penitentiary in this country, and, according to their conduct in this stage, to be placed on their arrival in Australia in either a probation gang, or on probation pass, or on ticket-of-leave.

In carrying out this new system certain defects of execution prevented its complete application, and in 1847 a change was made, which virtually established the system which is now in force. The change made in 1847 was, first, that the whole of the convicts under sentence were to pass through the Pentonville or cellular system of training; and secondly, that the other part of the penal stage of the sentence of transportation, viz. that which was passed on public works, was to be carried out in this country, thus ensuring the services of people fully qualified to carry out and superintend the arrangements efficiently, and bringing to bear on them the wholesome check and support of an educated public opinion. The convicts were to be sent to the Colonies, only after going through all this discipline, and arriving at the stage of ticket-of-leave. The convicts on ticket-of-leave have since 1853 gone only in small numbers to Australia, and since 1867 none at all.

The Board of Directors to work this system and absorb the duties of various bodies which had managed English Government Prisons was created in 1850, with Sir J. Jebb as chairman. The Irish Board, of which Sir Walter Crofton was chairman, was established on the model of the English Board four years later. It had to deal with a condition of disorganization and demoralization which had led to an enquiry by a Commission, of which Sir W. Crofton was an active member, and, as their first report (date April, 1855) says, they 'endeavoured to assimilate the treatment of the Irish convicts as far as possible to those of England,' on the system which has just been described, and they justify the practicability of some of these proposals by their having 'already been proved to demonstration in England.' They say:—

'It appears to us beyond all question, that by such measures as have been in operation for some years in England, and which are now being introduced into the Convict Service in this country, the following results are clearly to be attained, viz., the application of the labour of able-bodied

convicts to the production of works of permanent utility and profit in the country; a considerable return for the outlay and expense incurred in the maintenance of convicts, derived from the value of the work actually performed by them; the establishment of habits of steady industry, and in most cases, a determination to lead an honest life, and a desire to obtain a respectable position in society.

'We believe these results to have been fully produced of late years in England, and we do not see that any greater difficulties are presented to their attainment in this country; on the contrary, the character of the Irish convict is in very many cases less seriously depraved, their crimes having been produced in some measure by extreme distress, and the want of industrial employment: there is, therefore, greater ground to hope for a speedy and complete reformation. These objects being, as we hope, obtained by the reformatory system adopted towards the convict during his detention, it remains to offer him facilities for securing a respectable social position, by affording him the opportunity to exercise the habits of industry which he has acquired, and conform the reformation effected in his character.'

These facilities were in England furnished by the establishment of Societies for the Aid of Discharged Prisoners, and for finding these employment, but as such Societies did not get established in Ireland, 'intermediate' prisons, in which the inmates were placed in a condition of some freedom, were established in Ireland, with the intention of proving to employers that they might with safety employ persons who had gone through the reformatory training of the new system above described.

Some very sound reflections are made by the author on the subject of instruction in prisons, which might well be taken into consideration by those who are interested in this subject. He says 'Ici règne encore dans les esprits une grande confusion et le mot d'instruction donne lieu à un malentendu. Une arme puissante contre la criminalité, c'est l'éducation *sociale;* elle résulte de la vie, de l'expérience, du milieu, de cet ensemble permanent de circonstances externes, qui détermine la conduite et le caractère. Mais entre l'éducation de tous les instants et l'instruction qui consiste à donner pendant un certain nombre d'heures des notions de lecture, d'écriture et de calcul, un abime existe.

'L'instruction est un des nombreux facteurs du développement de l'individu; elle agit en bien ou en mal; elle rend l'homme accessible aux bonnes ou aux mauvaises influences; la lecture, l'écriture, le calcul sont des instruments; on peut s'en servir pour lire des livres obscènes, pour commettre des faux ou pour combiner des malversations, absolument comme on peut s'en servir pour accroître le patrimoine intellectuel et moral.'

He impresses the truth of his disparagement of literary education as a reformative influence by saying that 'L'instruction n'a jamais empêché un magistrat de l'ancien régime d'appliquer la torture, un despote de déclarer une guerre injuste, un fanatique politique ou religieux de brûler et d'exterminer ses adversaires. Elle n'empêche pas davantage un être aux instincts criminels de commettre des crimes.'

Highway robbery has not been diminished by education, but by improving the roads, lighting, and patrolling them; coining has not been diminished by education, which would in fact tend to make it rather more common, but by the mechanical perfection of true coining, which false coiners cannot compete with.

The circumstance that the prisons contain a great number of illiterate people does not arise from any connexion of cause and effect between them,

but rather that both are due to the same cause, in fact that the criminal classes are recruited from among those who are least favourably placed for obtaining instruction, people who by their own fault, or the fault of their parents have degenerated, and have had no moral training, or have cast it aside.

He quotes Herbert Spencer as follows:—'The partisans of education triumph when they establish by statistics that the number of illiterate criminals is in excess. They do not dream of asking whether other statistics established on the same system would not prove equally conclusively that crime is caused by the absence of linen, by a dirty skin, by living in narrow lanes, &c. A person who proposed to teach geometry by giving lessons in Latin, or thought to learn to play the piano by drawing, would be thought fit for a lunatic asylum. Yet it is not more unreasonable to expect to improve the *moral* sense by teaching grammar, arithmetic,' &c.

The author strongly leans to such a classification of prisoners as will enable them to be treated appropriately to the category in which they may be placed, the hopeful prisoner who is not an habitual criminal, to be managed differently, and apart from those who are; a practice which in England is adopted so far as to keep the two perfectly distinct. He would extend the distinction to the sentence, and would in fact not put the casual criminal for a slight offence in prison at all, but inflict a fine on him, or sentence him to labour (for the community it is presumed), unpaid for a certain number of days. The habitual criminal, for whom some hope may still be entertained, he would treat on the system we adopt in England; for the hopeless he has nothing but perpetual detention, as in a hospital for incurables.

It is not likely that a system so thorough as this last will ever recommend itself for practical adoption; except, possibly, in the case of prisoners whose mental deficiency is distinctly the root of their criminal habits, and who though not so insane that they can be locked up in an asylum, as dangerous to the lives or persons of themselves or others, are yet incapable of taking care of themselves and taking their place as members of society. What particular form of restriction and supervision might best be applied to such persons is a matter for consideration, but a measure which would protect society against them would go a long way to diminish crimes of a certain class.

The author condemns on the whole the system of supervision by the police, as practised in Belgium and France, and would substitute for it a system of bail, such bail to be furnished either from the money earned by the convict in prison, or by societies willing to undertake the duty. This idea has much to recommend it in principle; it would substitute supervision by the society for supervision by the police, and in the hands of responsible persons might be equally effective, while it would not have the disadvantage which is often charged against police supervision (very often without foundation however), that it prevents a discharged prisoner from obtaining honest employment.

The author discusses the system of transportation, which has so much in appearance to recommend it, because it puts out of sight many of the difficulties of a penal system carried out at home, especially when the alternative system in the latter case is supposed to involve either prolonged isolation in a cell, as in Belgium, or the promiscuous association of prisoners, as in France and most other countries.

The French in 1885, in their alarm at the increase of small crimes and of reconvictions, have on these grounds passed a law re-establishing transpor-

tation, no doubt encouraged by the successful results of the transportation system which we followed for so many years. The author, however, clearly demonstrates that our success was due to circumstances which no longer exist and cannot be repeated. We sent out to America and Australia, large and then unpeopled continents, great bodies of prisoners, among whom were many whose criminality was not strongly developed, and we sent them during a period when free emigration hardly existed, so that removal to a distant country had in it something of a penal effect. Notwithstanding these advantages, the system, as is well known, contained in itself evils which would not be allowed to exist in these days, and transportation certainly ceased to be itself a punishment, when it became an object of desire, for people of all classes, to better their fortunes by emigrating to those very lands.

We therefore established our present system of penal servitude in England, and significantly enough, since that time the number of sentences of penal servitude, and of persons maintained by government under that sentence, has continuously and largely decreased. In 1869, the number of persons sentenced to penal servitude was 2006; in 1884 it was 1349. On Dec. 31, 1869, we were maintaining 11660 prisoners under that sentence, at the present moment we have something over 8000.

The French scheme is especially hopeless, their penal colonies are small, the number of persons liable to be sent there, large. On completing their sentences, what is to become of them? Nothing is possible but to overflow to the Australian Colonies, or to return home, which is easy enough; and their doing so undoes all the supposed benefit of transportation. Let us hope that the French may convince themselves, as we have done, that whatever can be done with criminals, either to reform or deter them, is better and more economically done at home, and that emigration even under the name of transportation, to an agreeable healthy country, is not a punishment for crime, but should be treated as a reward. The author points out, indeed, that this measure should be adopted as a preventive for crime rather than as a punishment.

The author finally pronounces against the idea that there is any specific treatment for the cure of crime. He finds in the cellular system, and the system of regulated work in association, and the moral education of the progressive system, influences which should all be made use of in their place; but he believes, in the first place, in the efficiency of prevention by all means through which the young can be trained, opportunities opened to all, and needless difficulties and temptations removed. Further, for those who can neither be prevented nor cured, he advocates perpetual detention in a kind of asylum for incurables, in which, without useless luxury, and without superfluous hardships, under a strict superintendence, society should protect itself against them by protecting them against themselves.

E. F. Du Cane.

Statement on the Land Laws. By the Council of the Incorporated Law Society of the United Kingdom. London: Butterworths. 8vo. 57 pp.

The Times. Letters by G. Shaw Lefevre, H. Davey (now S. J.), R. H. Holt and Arthur Arnold.

The Contemporary Review for February and March, 1886. 'Free Land,' by Lord Hobhouse.

The National Review for February, 1886. 'The Laws relating to Land,' by Sir J. F. Stephen.

Remarks on the Land Transfer question, with a sketch of a plan for a general register. By F. Hoare Colt. London: H. Sweet. 1873. 34 pp.

The Land Transfer question, containing suggestions supplementary to the writer's plan for a general register. By J. Hoare Colt. London: H. Sweet and Sons. 1885. 32 pp.

How to make simple the Transfer of Land. By Joseph Powell. London: William Clowes and Sons, Limited. 1885. 40 pp.

A Dialogue between a Doctor of Laws and Student touching the reasons why the Land Transfer Acts are not generally used. 2nd Ed. London: H. Sweet and Sons. *n. d.* [1885.]

The schemes that have been proposed for simplifying the transfer of land or rendering it safer may be classified as follows:—

(A) Allowing no legal ownership other than estates in fee simple and terms of years, appointing a real representative on death, making all settlements by way of trust, and empowering the owner in fee, whether he be a trustee or not, to sell. This scheme was I believe originally proposed by Mr. Wolstenholme in a paper read before the Juridical Society in 1862 (see 2 *Jurid. Soc. Pap.* 533), which deserves most careful study.

(B) Registration of assurances, which may be (1) speaking, i.e. containing full copies or memorials of the assurances, or (2) blind, i.e. giving the dates and parties only: see as to this distinction the evidence given before the Committee of the House of Commons 1878–79 (commonly known as Mr. Osborne Morgan's Committee) by Lord Cairns.

(C) Registration of title after official examination.

(D) Registration of title without official examination.

Scheme (A) may be combined with either (B) (C) or (D).

Two different schemes for registration of title after official examination were embodied in Lord Westbury's Land Registry Act of 1862 and in Lord Cairns' Land Transfer Act of 1875. The complete failure of these Acts, the causes of which will be found discussed in the evidence taken by Mr. Osborne Morgan's Committee, renders it most improbable that any scheme for registration of titles after official examination will be adopted.

The same Committee took a great deal of evidence as to the registration of assurances. The advantages and disadvantages of this scheme, which will be found discussed in the Statement of the Council of the Incorporated Law Society and in an article by Mr. Colt (21 *Law Journal*, 103), would take more space than the limits of this article will allow. I may however remark that the serious objection to it, arising from the necessity of inspecting all the deeds registered against the names searched against, would be reduced

to a minimum by adopting the Scottish system of search sheets. A search sheet is a collection under one head of all the entries applicable to particular land or property; two indices are kept in the registry office, one of the parties, the other of the places, mentioned in the search sheets; the index of parties contains their designations, a short description of the subject in the entry, and a reference by number to the entry, and the index of places contains not only the names but short descriptions of the subjects. Official searches are made, and a certificate of the result is given containing a statement in order of date of all the entries on the register relating to the property searched against. On any subsequent dealing with the property, all that is required is to continue the previous search. See Mr. Brodie's evidence given to Mr. Osborne Morgan's Committee.

The learned author of 'Doctor and Student' is in favour of a scheme practically the same as Mr. Wolstenholme's scheme combined with registration of title after official examination, the title to be made out to the reasonable satisfaction of the registrar. In some of the colonies, where registration after official examination is adopted, the rule is to accept all titles which are practically safe, charging a very small percentage as an insurance fund. See the evidence given by Sir R. Torrens and Sir A. Blythe before the Committee mentioned above.

Mr. Hunter, in a paper read at the annual provincial meeting of the Incorporated Law Society in 1885, reported 29 *Solicitors' Journal*, 782, and Mr. Powell adopt Mr. Wolstenholme's scheme combined with a register of assurances.

Mr. Horace Davey, now Solicitor General, and Mr. Colt are in favour of registration without official examination of title, Mr. Davey's scheme being of the same general nature as that suggested by the Land Registry Office and printed in the Appendix to the report of Mr. Osborne Morgan's Committee 1878, and explained by me *ante*, p. 12. Mr. Colt also proposes that where the land is settled the trustees should be registered as owners, and that they should be bound to create at the request of the tenant for life all the estates that he can grant under his statutory powers. It appears to me that Mr. Colt's proposal, if adopted, will do away with one of the most useful provisions of the Settled Land Act, that of enabling the tenant for life to act without the concurrence of his trustees: for the reasons that I gave *ante*, p. 18, I do not think that there will be any practical difficulty in registering the tenant for life as owner.

The Statement by the Council of the Incorporated Law Society contains a concise history of the changes in the law of transfer of land since 1828, and of the proposals for changes which have not passed into law, stated in an intelligible form. It also discusses the advantages of registration of assurances and registration of title after official examination: it does not mention any scheme for registration without official examination, except that propounded by the late Mr. Strickland Cookson, which is in effect Mr. Wolstenholme's scheme combined with registration without official examination of title, nor the distinction between blind and speaking registers of assurances; and though it mentions the Scottish system of registration, it does not explain the excellent system of search sheets. It is somewhat disappointing that the Statement which discusses many of the difficulties incidental to registration of title makes no attempt to show how to obviate them. The conclusion that the Council comes to is that Mr. Hunter's scheme 'would make sales as easy and inexpensive as it is possible to make them.'

It appears convenient, before discussing the proposals for amending the

law of land settlements, to state the objections to the existing system. They may be stated as follows:

(1) Neither the tenant for life nor his trustee in bankruptcy is able to sell the settled property for the purpose of paying his debts. The consequences are,

(A) A powerful motive for sale is wanting, and land is kept out of the market.

(B) There is a risk of the life interest being sold, in which case the land falls into the hands of a person who is certain to mismanage it, by endeavouring to get all that he can out of it without regard to the permanent injury that he does to it.

(C) A tenant for life can only borrow money on most exorbitant terms by means of a mortgage of his life interest and a policy, so that if he falls ever so slightly into debt he becomes an embarrassed man.

(2) The tenant for life may consider it his duty not to expend money on improvements which ought to be made, but which would be for the benefit of his eldest son only, or even of collaterals, on the grounds:

(A) That it is his duty to put by for his younger children.

(B) That his successor is an unworthy person.

(3) The property must devolve on a person unborn at the date of the settlement, a person whose character is necessarily unknown to the settler; and this notwithstanding that he may be a lunatic, a spendthrift, or incurably vicious.

(4) The eldest son has such facilities for raising money as soon as he comes of age, as to render him disobedient to his father and an easy prey to money-lenders.

(5) The existence of life tenancies renders it necessary to trace back titles during a longer period than would be the case if they were not allowed.

Objections (1) (A), (1) (B) apply to settlements of land of every nature; objection (1) (C) applies both to settlements of land and money; objection (2) does not apply to settlements restricted to and comprising all the children of the tenant for life who attain twenty-one or marry; objections (3) and (4) do not apply where the tenant for life has a power of appointment among his children, and, even if this is not the case, they lose much of their force if the settlement extends to all his children who attain twenty-one, &c., they apply to settlements of money as well as of land; objection (5) applies to all settlements of land, even in the very restricted form that Mr. A. Arnold would allow, viz. a settlement on a widow for life with remainder to the testator's children: it would however be obviated by the adoption of Mr. Wolstenholme's scheme for the transfer of land, or of any of the systems of registration of title.

Lord Hobhouse's articles contain a most interesting historical sketch of the law of entail in language intelligible to people who are not lawyers, giving the political or social reasons for the changes that have from time to time been made in the law. He discusses at some length and with much clearness the objections to strict settlements; he points out that most of them are not the discovery of modern times, but were taken by the great Elizabethan lawyers Popham and Coke, and by Blackstone. He omits to mention Bacon (see his argument in *Chudleigh's Case*, Works, ed. Spedding, vii. 617), the opinion of the Court of King's Bench in *Martin* d. *Tregonwell* v. *Strachan*, 1 Wils., at 73, and Piggott, see his 'Treatise on Recoveries,' at p. 5. He proposes to repeal the statute *De Donis*, and to enact that no gift either of real or personal property should be valid unless made to a person in being at the time when the instrument creating it takes effect,

except as to gifts contained in marriage settlements in favour of the wife and offspring of the marriage. He also proposes that fee simple lands should on death vest in the executor and be administered as leaseholds. He considers that all schemes for simplifying the transfer of land are useless in the present state of the law.

Mr. Justice Stephen is the author of a much more ambitious scheme, contained in a very remarkable article in the *National Review*, one to which it is impossible to do justice within my present limits. Irrespective of the great merits of his proposals, the publication of his article must do much good, for the very fact of its having been written by a judge and published in the *National Review* shows that the questions discussed in it have passed out of the region of party politics. I believe that as lately as the election of 1880 any candidate who propounded Mr. Justice Stephen's views would have been considered a 'Liberal and something more.' He proposes to abolish the whole of the existing law of real property with a few exceptions, the principal of which are the statutes of limitations, the laws relating to rights *in alieno solo* and mortgages, and to substitute for it the existing law of personalty. He also proposes, and this is perhaps the most remarkable part of his article, to deal with existing settlements with great boldness. Under his scheme, persons interested under an existing settlement would be able, sometimes even without the consent of all of them, to vary the provisions contained in it: the interest of any tenant in tail born after the passing of the Act would on death pass to his personal representatives; and a strict entail under which no child had been born would, after the passing of the Act, be equivalent to a life estate, with a power of appointment among the children. He also says 'the abolition of the real property rules of descent would effect a change which, so far as I know, everyone considers expedient, and on which it is not necessary to waste a word.' It is obvious that he wishes settlements of land to be restricted to the form usually adopted in the case of personalty, namely, where the unborn children who attain twenty-one, &c., are to be equally subject to a power of appointment in the parents, for he suggests that 'all owners of property shall have the same power of settling and dealing with property, either by will or by deed, as they now have with respect to personal property, and no other.' In considering the effect of this proposal, we must remember that he was not writing for lawyers, who know that personalty can be settled so as to produce the same effects as a strict settlement of land, except in the rare case of the eldest son of the tenant for life marrying and dying under age, leaving a child who inherits his estate tail, but for the public, who are only conversant with settlements of personalty in the usual form. Again he says, 'I think ninety-nine quiet people out of a hundred would say it is right that a man should be allowed to provide prospectively for any living person, and, if he likes, for the unborn children of any such person. It is wrong that he should be allowed to restrain further the power of the living over what was his property when he himself is dead and gone. . . . . How many people with even a moderate income would allow their daughters to marry without some provision by way of settlement giving a life interest to the husband and wife successively, and providing by powers of appointment for unborn children, and also for the case of no children being born of the marriage? . . . . Now in what does the law of entail and settlement so much exclaimed against differ from the law as to personal property, of which no one complains?' It will be observed that Mr. Justice Stephen's proposals are very nearly the same as those of Mr. Shaw Lefevre.

The Statement by the Council of the Incorporated Law Society gives a popular account of the existing system of strict settlement, and of the great alterations introduced by the Settled Land Act of 1882, 'by which it has been made impossible to entail land, i. e. to keep the actual land in settlement, at all.' The discussion of the objections to strict settlements appears to be somewhat imperfect. The only writer whose objections are stated is the late Mr. Kay, and though 'Free Land' and part of Mr. Shaw Lefevre's scheme are discussed, the reasons by which they are supported are not given. The Statement ignores Mr. Davey's letters to the *Times* and Mr. Shaw Lefevre's article in the *Nineteenth Century*. The conclusion that the Statement comes to is that 'under the Settled Land Act a tenant for life has practically for all proper purposes which a prudent owner would desire to effect a complete power of selling, leasing, improving, and managing the settled estate as if he were fee simple owner. In one respect, and in one only, is he restricted: he may not squander the settled capital .... Whatever truth, therefore, there may formerly have been in the economic objections, it is entirely swept away by the Settled Land Act.' The Statement also proposes to abolish estates tail and to have a realty representative.

Mr. Shaw Lefevre's original scheme, contained in a paper read before the Social Science Association, 1877, and republished in his *English and Irish Land Laws*, was to assimilate the law of realty to that of personalty, and to prohibit a settlement either of land or money on any unborn person, unless it took the form of a life interest to the parent with a power of appointment among the children.

The adoption of this scheme would obviate the objections (2) (3) and (4) stated above. In the *Nineteenth Century* for October, 1885, he has made a further suggestion, which, if adopted, will obviate objection (1). He proposes that 'power should be given to the creditors of the tenant for life to compel a sale of settled property with a view to the realisation of a bankrupt's estate to its full value. The limited owner should also be empowered to compel a division of the produce of the sale between himself and the reversioner.' It is hardly possible to say how great a benefit this proposal, if adopted, would confer not only on the tenant for life but on his children. At present if a tenant for life falls into debt, he can only borrow money by the ruinous device of a mortgage of his life interest and a policy on his life. Owing to the fact that but few private persons are willing to advance money on a security of this nature, the advance invariably bears interest at the rate of five per cent., to which must be added the premiums of the policy, which, if the borrower is aged fifty, amount to about another five per cent.; the result being that if he borrows £1000 he has to pay in interest and premiums £100 a year. On the other hand, taking the three per cent. tables, the interest of a tenant for life aged fifty is more than one-third of the value of the fee, so that if he were to sell property to the value of £3000 he would more than be able to pay his debt; the surplus, nearly £2000, would belong to the children, and might be applied for their maintenance. The tenant for life would lose in income £90, about two-thirds of which would go to his children. The full benefit that this scheme confers on the children appears in the case of the bankruptcy of the tenant for life. Under the existing law his life interest is sold, and the children must be supported by the charity of their relations or go to the Union. Under Mr. Shaw Lefevre's scheme their share of the settled property would become immediately available for their maintenance.

The value of the interest of the tenant for life depends upon (1) his age, (2) whether his life is good or bad, (3) at what rate interest is calculated.

I consider that it would save much litigation if the question whether his life was good or bad were not allowed to be raised, and if the rate of interest were fixed by the Act making the change. The better course would be to insert in the Act itself a table showing the percentage of the amount realised that a tenant for life of any age should be entitled to receive.

Mr. Arthur Arnold's proposals, which will be found in his 'Free Land,' and in his letter to the *Times*, are to prohibit all settlements of land, except trusts for the benefit of the widow or infant children of a testator, but to allow charges on land even to the full amount to be settled.

These proposals, if adopted, will obviate only the first objection to settlements; they will leave the second, third, and fourth intact. I have already stated their effect on the fifth objection.

I am of opinion that, as pointed out by Mr. Lefevre in his letter to the *Times*, it would not be very difficult to devise methods of evading the proposed law, so long as settlements of charges on land are allowed; and I hardly think that anyone would wish to go further and to prohibit the settlement of charges on land, which would in effect prevent trustees investing money on mortgage.

It appears to me that Mr. Arnold's scheme would produce an intolerable amount of inconvenience. It would interfere with the wills and settlements commonly adopted by the middle classes. It entirely ignores the difference between settlements having for their object to secure that one member of a family shall be wealthy, 'keeping up the family,' as it is sometimes called, and those having for their object the preservation of the whole family, husband, wife and children, against unavoidable misfortune, or the preservation of the wife and children against the extravagance of the husband.

By far the greater number of wills made by people of the middle class give all the testator's property, both real and personal, on trust for sale and, subject to a life interest to the widow, to the children who attain twenty-one equally, with power to the trustees to postpone the sale and a declaration that till sale the income is to be applied as if the sale had been made, the effect of which is to make a settlement of the land itself in equity. Mr. Arnold would allow a will of this nature. Now suppose that one of the testator's daughters has married a spendthrift, or a man who has been unfortunate in business, the testator knows that if, as often happens in such cases, his daughter retains a strong affection for her husband, any property given to her will be handed over to him; he therefore settles her share on herself and her children; this would be prohibited under Mr. Arnold's scheme. Again, it is a common and most useful provision in a marriage settlement of personalty to empower the trustees to purchase a residence for the married pair; this also would be prohibited.

It is desirable that all persons interested in the reform of the land laws should without delay make up their minds as to the merits of Mr. Arnold's and Mr. Lefevre's schemes, as indications are not wanting that Mr. Arnold's followers intend to make the support of his scheme a test question at the next election.

HOWARD W. ELPHINSTONE.

Das Englische Armenwesen. Von Dr. P. F. ASCHROTT, Gerichts' Assessor in Berlin. 8vo. 450 pp.

IN this small 8vo. volume we have an interesting and readable review of the historical development and the present state of the English Poor Laws. A very valuable feature of the work is the clear and convincing manner in

which the author exhibits the practical effects of the varying motives and objects with which laws of poor-relief were enacted and administered; and how invariably and rapidly sound and unsound principles produced their natural fruits of good and evil to the poor themselves and the community at large.

Before the Reformation the care of the poor was almost exclusively in the hands of the Church. Almsgiving was considered as in itself a holy work, obligatory on every Christian man. The effect on the receiver was but little regarded. The indiscriminate charity of the religious houses created so large an army of idle beggars, that not even the revenues of a wealthy Church could satisfy their demands, and the peace and property of the whole country were endangered by vagabonds and tramps. Laws were enacted of ever-increasing but utterly unavailing severity, which culminated in the Act of Richard II (1388), by which 'sturdy vagabonds' and 'valiant beggars' were ordered to be publicly whipped for the first offence, to have their ears cropped for the second, and to be hung for the third.

The secularization of the monasteries, &c. inevitably led to new methods of providing for the relief of the poor; and the Act of Henry VIII threw on the parishes the obligations hitherto resting on the Church. The necessary funds were raised by the voluntary contributions of 'good Christian people.' The various enactments and provisions of this and the succeeding reign were combined into a well-ordered system by the famous Act of Elizabeth (43), which was founded on the solid ground of experience, and may be truly said to be the groundwork of all subsequent legislation on this subject. The quasi voluntary offerings of the charitable now took the form of a fixed and compulsory rate, and collectors and overseers were appointed to receive and administer the funds thus raised.

A change—and, as might be expected, not a beneficial one—was made by the notorious Settlement Act of Charles II (1662), which practically confined a poor man to the parish in which he was 'legally settled,' and forbade him to seek employment in another in which his services might be more acceptable. Powers were given to the magistrates to remove a new-comer who became chargeable, or was '*likely to be chargeable*,' back to his former parish. It was, in fact, an 'Act of relief' to the rich, who dreaded the immigration of the poor into their prosperous parishes.

The erection of Poor Houses, which play so prominent a part in the present Poor Law system, began in Bristol in 1697, with excellent results. The principle was laid down that no pauper who refused to enter a workhouse should be entitled to ask or receive relief.

A remarkable change for the worse took place in the last quarter of the eighteenth century, when the poor rate, which was £1,912,000 in 1785, rose in 1817 to £7,870,801! The distinction between the able-bodied and the impotent, so sharply defined by the Act of Elizabeth, was almost entirely disregarded, and the work of the overseers was performed without energy or discrimination. The whole property of the country seemed on the point of being engulphed in an abyss of pauperism. The operation of Gilbert's Act (1723), by which the outdoor 'allowance system' was introduced, and insufficiency of wages made up out of the poor rates, only increased the evil. The poor rate became virtually a mode of paying wages of the worst possible kind, and tended directly to encourage idleness and destroy all energy and independence among the labouring classes. 'The wise and simple provisions of Elizabeth's Act,' says Sir Erskine May, 'had been so perverted by ignorant administration, that in relieving the poor the industrial population of the whole country was being rapidly reduced to

pauperism, by which property was threatened with no distant ruin; no evil genius could have designed a scheme of greater malignity for the corruption of the race.'

The evil became at last intolerable, and by the Sturges-Bourne Act a return was made to sounder administration. Then followed the Vagrant Act of George IV, 1824, and the Hobhouse Act, 1831, both in the right direction. In 1832 a Royal Commission was appointed to enquire into the operation of the Poor Law, and their report is a masterpiece of searching, comprehensive, and impartial investigation. On the authority of this report a bill was introduced into the two Houses of Parliament by Lord Brougham and Lord Althorp, and passed in 1834.

The next important step in the development of the English Poor Law is marked by the appointment of the Select Committee and by the Poor Law Board Act of 1864, by which the system of poor relief received in the main its present form.

After tracing the gradual development of the English system, the author gives a detailed account of its *modus operandi*, and concludes by describing the manner in which it is supplemented by private charity and the beneficent work of the 'Charity Organisation Society.'

We can strongly recommend this work to all who are interested in the well-being of the poorer classes. W. C. P.

The Law of Husband and Wife. As established in England and the United States. By David Stewart, of the Baltimore Bar. an Francisco: Sumner Whitney & Co. 1885.

This book belongs to the same series with Boone on Mortgages, which was reviewed in our July number. Most of the comments then made on the earlier work are applicable to the later, and, in truth, there is not much more to be said about it. It is neither a treatise nor a digest, but a list of the cases bearing upon the law of husband and wife, arranged so that they can be found as quickly as possible. There is no attempt at discussion in the book, scarcely a trace of the author's opinions, and but little evidence that he is anything more than a machine through which all existing volumes of law reports have been passed, and which is so constructed that all the cases bearing upon his subject shall come out duly sorted and labelled. Such a book has its value, however, when the lawyer who uses it has a complete library to which he can turn, and criticism is almost disarmed by the frankness of Mr. Stewart's preface, where he says: 'Discussions of disputed questions have been, as far as possible, avoided, a bare statement of the points made on the different sides, with the authorities, being given.'

The intent of the book is, on the whole, carried out very well. Its extreme condensation leads, here and there, to a ludicrous vagueness of statement; for example, it does not answer a doubtful question in the conflict of laws to say: 'Still courts will sometimes refuse to apply any but the local law' (§ 31), or, 'It is hard to define how far the law of the forum may in peculiar circumstances prevail' (§ 37). In a few instances the citations do not bear out Mr. Stewart's statements; in *Yerby* v. *Yerby*, 3 Call 334, the Court did not decide that a will made by a widower with children living is not revoked by a subsequent marriage and the birth of other children (§ 51); the case turned on a particular statute. Again, Mr. Stewart gives very little space to the obligations of a married woman

as stockholder, perhaps because the matter is treated in other publications of the series. These shortcomings, however, are few and far between, and the list-making has been accomplished with industry, order, and intelligence.

In § 394 Mr. Stewart calls attention to the curious and interesting history of the conveyances of married women in America; but his method does not allow him to treat the matter more fully. He says that 'in some States, independently of statute, the joint deed of husband and wife has always been recognized as if authorized by the common law.' At common law, after the Stat. 32 Henry VIII. c. 28, a *feme covert* could convey her lands only by fine, except in the case of deeds in the nature of a fine made according to the customs of the City of London and certain other cities, boroughs, and towns—the validity of these deeds being expressly recognized by the Stat. 34 & 35 Henry VIII. c. 22. It is now impossible to discover in America if the manor of East Greenwich or Greenwich, according to the tenure of which the lands in most of the American colonies were held, had a custom like that of the City of London; probably it had not, but it was soon necessary for the emigrants to find a way to pass the estates of married women. The necessity arose in two cases, where the wife had an actual present title to the land, and where she had an inchoate right of dower therein.

The earliest conveyances made by married women in the Plymouth colony (where the records are the oldest and fullest) belong to the first class, and here the husband and wife join in an ordinary deed of bargain and sale. Perhaps the colonists had not heard of a fine; perhaps they had heard of the custom of London; it is certain that they did not look upon landed property with any especial respect. They entered on their earliest records conveyances of land and cattle indiscriminately, and made little distinction in the disposition of the goods and lands of an intestate, treating the latter much like personal property. Very possibly this confusion made them relax the rigour of the common law, and led them, while saving to the wife a voice in the disposition of her property, to allow her to dispose of it by joining in a deed with her husband. These same loose views with regard to the nature of real estate affected their treatment of dower. The widow, indeed, seems to have been endowed of the lands of which her husband died seized, while the latter conveyed them in his lifetime without regard to her. About 1645 both Plymouth and Massachusetts Bay passed laws preventing such alienation in the future, while expressly validating it in the past. In Connecticut no such statute was passed, and the right to dower remained thus abridged. Both the Massachusetts and the Plymouth statutes provided that the wife might bar her dower by signifying her assent in writing and acknowledging the same; and this assent was very generally given by joining with her husband in the deed as co-grantor. These statutes undoubtedly tended to establish the right of a married woman to convey all her lands by deed, and to regulate the form of the conveyance; no private or separate examination was required and the ordinary form of acknowledgment was used. Now in Massachusetts an acknowledgment is not generally necessary to the validity of a deed, but only to its record. An unrecorded deed is valid except as against those who have acted in ignorance of its existence. The acknowledgment of a married woman, being in the ordinary form, soon had no more effect than an ordinary acknowledgment, and a married woman could convey her lands with no formality other than the signing and sealing a deed jointly with her husband. The deed could even be recorded, for the acknowledgment of one grantor is sufficient, and this

principle was extended to the case of a husband joining in the conveyance of his wife's land.

In other colonies similar results were reached. In New Hampshire, the mere signature and seal of a married woman, affixed to her husband's deed, barred her of her dower, and in New York the Courts sustained a usage whereby a woman's separate deed passed the title to her real estate, subject to her husband's rights. In Pennsylvania fines were not unknown, yet the custom allowed a *feme covert* to convey her real estate by joining with her husband in a deed of it, and this without separate examination. In the Carolinas fines were unknown, and married women conveyed their lands by deed long before statutes were passed enabling them to do so.

We have said that there is scarcely a trace of the author's opinions to be found in this book; it is only just to add that in § 62, without any authority to support him, he has ventured to assert that a wife cannot legally lock up her husband to prevent his eloping or keeping lewd company. To cite *Ross* v. *Ross* as *Ross* simply, a custom which Mr. Stewart adopts in all like cases, is very inelegant, though of course it saves space.

F. C. L.

Handbuch des deutschen Handels-, See- und Wechselrechts, unter Mitwirkung der Herren Prof. Dr. BRUNNER in Berlin, Prof. Dr. COHN in Heidelberg, Prof. Dr. GAREIS in Giessen, Prof. Dr. GRÜNHUT in Wien, Geh. Bergrath Prof. Dr. KLOSTERMANN in Bonn, Geh. Ober-Finanzrath KOCH in Berlin, Prof. Dr. KÖNIG in Bern, Prof. Dr. KUNTZE in Leipzig, Prof. Dr. LASTIG in Halle, Prof. Dr. LEWIS in Berlin, Justizrath PRIMKER in Berlin, Rechtsanwalt Dr. REATZ in Giessen, Prof. Dr. REGELSBERGER in Würzburg, Prof. Dr. SCHOTT in Kiel, Prof. Dr. SCHROEDER in Strassburg, Ministerialrath Dr. Frhr. von VÖLDERNDORFF in München, Prof. Dr. WENDT in Jena, Prof. Dr. WESTERKAMP in Marburg, Prof. Dr. WOLFF in Göttingen: herausgegeben von Dr. W. ENDEMANN. 4 vols. 1881–1884. Leipzig: Fues (R. Reisland).

THIS is the first book which gives a systematic compendium of German mercantile law with the fulness of detail which entitles it to the name of a 'Handbuch,' in the sense which German usage has given to that word. The same task has been attempted by Goldschmidt, one of the greatest of living lawyers, but only a small portion of his work has been completed, and there is much reason to fear that it will remain a fragment. The unaided efforts of one man are in fact insufficient for an undertaking of such magnitude, and the plan which the publishers have adopted, in inviting the co-operation of a number of writers, seems a good one, for the simple reason that it is the only one by which the execution of such a work within a reasonable time is possible.

The work consists of an introduction and five books, dealing respectively with 'Mercantile Persons,' 'the Objects of Mercantile Intercourse,' 'Mercantile Transactions,' 'Maritime Law,' and 'the Law of Bills of Exchange.'

The introduction by the Editor is rich in information, clear and concise. It begins with an historical sketch, showing the connection between the bye-laws of the mediæval trade-guilds and trading towns in Italy and the present mercantile law. Mercantile law, though originally of local application, came to be considered as a sort of universal law, distinguishable from

the municipal law which was applicable in ordinary matters. This unification, as Professor Endemann points out, was in great part due to the common desire of legal writers to reconcile commercial practices with the stringent provisions of the Canon law against usury. It required a considerable amount of ingenuity to succeed in this effort, and it was easier to accomplish the feat by looking on mercantile law as a uniform body of law. We are sorry that Prof. Endemann does not refer to the English system of the staple, and the original Law Merchant; we have no doubt that an enquiry into that system would throw considerable light on the history of mediæval mercantile law.

The English Law Merchant is in our days completely merged in the Common Law, but in Germany, as in other continental countries, mercantile law continues to exist as a 'Sonder-Recht,' that is, as a system of rules differing from the ordinary law, and applicable in certain special cases. It is frequently not an easy question to ascertain whether a given transaction is to be judged by the rules of mercantile law, or whether it is subject to the general law, and it is therefore a special branch of commercial law to enquire where and how that system is applicable. Prof. Endemann's chapter on this subject is very satisfactory, but we regret the necessity for learning of this sort, and we specially regret that the new civil code for the German Empire has not abolished a dualism, which will no longer have any 'raison d'être.'

The chief sources of German commercial law are the Mercantile Code and the Code of Bills of Exchange, which existed as the law of the individual states before the establishment of the Empire, and have since been re-enacted as Imperial laws: any questions not regulated by the Codes or by Imperial statutes are in the first place to be governed by mercantile customary law, failing which the ordinary law of the particular state is to be applied. A great many points are expressly reserved by the Codes to be regulated by the law of the individual states; other points have been dealt with by Imperial statutes—in the list given by Prof. Endemann we miss a reference to the law of 1880 against usury; there is also a misprint in the date of the 'Haftpflichtgesetz,'—and legal science and judicial decisions (though not binding in the strict sense) have definitely settled a number of questions. The relation of all these sources of law to each other is explained by the author with great care and precision.

Considering that there are a number of different systems of law which are practised in Germany, the subject of the conflict of laws is an important one. The main points of this subject are discussed in the introduction, but hardly receive full justice; the question, for instance, as to the cases in which the 'lex fori' is applied, is treated rather vaguely. The summary relating to the mercantile law of foreign countries, contains a paragraph concerning the United Kingdom and its dependencies, which, though not incorrect, gives rather scanty information. As India is specially mentioned, a word about the Codes of that country might not have been out of place.

Among the monographs forming the first book of the work under review, the one by Professor Wendt on mercantile agency is, in our opinion, the most interesting. There is perhaps hardly any branch of German mercantile law which differs so widely from English law as this one. The 'Prokurist,' for instance, whose unlimited authority with respect to all transactions relating to his principal's trade cannot be modified with regard to third persons, has no counterpart in our law. Again the rule by which only those persons are to be considered agents who contract in their principal's name (either expressly or by necessary implication), is strikingly different from the rule

prevailing in this country. Commission merchants, for instance, are not considered as agents in the English sense, but are dealt with by separate regulations to which we shall have occasion to refer. The subject is a difficult one, but it could not have found a better exponent than Professor Wendt.

Professor von Völderndorff's article on the characteristic marks and the classification of traders is systematic and comprehensive, but might be shortened; the same may be said of Professor Lastig's Contribution on the Law of Partnership. Many varieties of mercantile associations are allowed by the German Code: leaving aside joint-undertakings of a temporary nature, there are ordinary partnerships, limited partnerships, (which are again subdivided into ordinary limited partnerships, and those in which the capital of the limited partners is subdivided into shares), and associations in which a person receives a share in the profits without being a partner ('stille Gesellschaften;' they correspond to a certain extent to the associations, contemplated by the Partnership Law Amendment Act of 1865); there are further joint-stock undertakings and corporations of various kinds. The distinction between these different associations is not really difficult, and Professor Wendt in his monograph on limited partnerships manages to draw it with great precision in very few words; Professor Lastig, on the other hand, devotes a good deal of space and ingenuity to it, without throwing much light on the matter in its practical aspects. We do not deny that there is a certain interest attached to his speculations, but they seem to us out of place in a general handbook.

The law of Joint-stock Companies is the subject of an essay by Justizrath Primker. As, since the publication of the volume, the German Joint-stock Companies Act of 1884, modifying the law in many important points, has come into force, a new edition of this article is promised as an appendix to the 'Handbuch.' We hope that in this new edition the English law of Joint-stock Companies will receive a more competent treatment than in the issue before us. The author mentions the names of several English works on the subject, among others Lord Justice Lindley's treatise, but we do not think he can have used any of these authorities. This is, for instance, the way in which the effect of the Act of 1862 is stated: 'Associations in England are, therefore, divided into two great classes: partnerships, being all associations consisting of less than seven partners, and companies, consisting of more than seven partners. The figure 7 ... therefore is the arbitrary but fixed and conspicuous limit. For partnerships the common law is sufficient, which continues unchanged as before.' It would be hopeless to point out the many inaccuracies which are contained in this statement. Mr. Primker has completely missed the characteristic points of English Company Law. The relation of Companies incorporated under the Act of 1862 to trading corporations and to Companies constituted in other ways ought to have been pointed out; the peculiar effect of the Memorandum of Association in the case of registered Joint-stock Companies, the doctrine of 'ultra vires,' the unlimited liability of shareholders in limited Companies with reference to bank-note issues, and numerous other points, strike the foreign observer at first sight, but the author of the article is silent about them.

The second book deals with 'the Objects of Mercantile Intercourse,' and is opened by Prof. Endemann's monograph on 'Chattels and Merchandise.' Many interesting points are discussed in this article, among others the subject of the passing of property by the delivery or endorsement of documents of title (the question on which *Sewell* v. *Burdick*, 10 App. C. 74, turns

is fully discussed), the protection given to bona fide purchasers (which goes further than in English law), the law of pledges, etc., etc. The article on Money and Money Tokens, by Geh. Rath Koch, the chief legal officer of the German Reichsbank, contains much valuable information. The most interesting contribution to this part of the work is that by Prof. Brunner on Valuable Securities, which, according to the author's definition, are 'documents relating to a private right, the realization of which, by the rules of private law, is conditioned on the possession of the document.' This definition is wider than that of negotiable securities, though the latter form the most important class of the documents referred to. The rules on this subject, as may be expected, are rather complicated, but Prof. Brunner knows how to put them into the clearest form; his wide historical knowledge and constructive skill are used to good purpose, but nowhere does he forget that the chief object of his essay is to present the subject in its practical aspect. The article is in every way worthy of the author's great reputation. The other parts of the second book deal with copyright, patents, work and credit, as objects of mercantile intercourse.

The introductory article to the third book (on Mercantile Transactions) is written by Professor Regelsberger; it chiefly deals with the general parts of the law of contracts; the questions arising with contracts formed by correspondence, the formal and material requirements for the validity of contracts, and the methods of interpreting intention, are very fully discussed. The mercantile law on these matters differs very materially from the general law, and the subject presents many difficulties; it could not have fallen into better hands than those of Dr. Regelsberger. The next article, by Prof. Gareis, deals with sales. Here again many differences between the mercantile law and the general law have to be pointed out; the 'lex Anastasiana,' for instance, and the rescission for 'laesio enormis' are not recognized by mercantile law, the tendency being to remove all restrictions from free intercourse; a slight reaction from this tendency may be noticed in the usury law of 1880, which also affects the subject of sales. Professor Grünhut's contribution on Stock Exchange transactions contains much that is interesting. The much debated question about the validity of purchases and sales, the result of which is not the transfer of any property, but the gain or loss of the difference in price ('differenz geschäft'), is fully discussed and answered in the affirmative. The business in options, continuation bargains, and other stock exchange operations, not generally familiar to lawyers, is explained with great clearness. Professor Cohn writes on lotteries, but his article seems out of proportion to the importance of the subject. The Editor's article on Work and Labour will be interesting to English lawyers, because it shows how the same questions crop up in different legal systems, though the circumstances through which they arise are not identical. The point which exercised our Courts in such cases as *Clay* v. *Yates* and *Lee* v. *Griffin* is discussed here for quite a different purpose. The view taken by Prof. Endemann corresponds almost literally to the one expressed by Pollock C. B. in the former case. Professor Grünhut's monograph on Brokers and Commission Merchants is also worthy of attention. We have already mentioned that the definition of Agency ('Vertretung') in the German Handelsrecht is narrower than that of English law. The commission merchant in Germany is, therefore, in a certain sense outside of the law of agency, and the complications which have arisen in *Addison* v. *Gandasequi* and similar cases (conf. the late case of *Mildred* v. *Maspons*, 8 App. Cas. 874) are met by rules which seem clear and practical. Another consequence is the right of the commission

merchant to become himself a party to the contract, on which his principal orders him to enter on his behalf. The article on carrying trades, by Professor Schott, is interesting but too much overloaded with details; it has an additional chapter on telegraphs and telephones, in which some important and interesting points are discussed. The next contribution deals with the liability for loss of life or disablement arising in the working of railways, mines, and quarries, as regulated by the Imperial statute of 1871; Professor Westerkamp is the author. Professor Klostermann's essay on the publishing business follows it.

One of the best contributions to the work is that by Professor König on the Law of Insurance. The author's extensive acquaintance with foreign literature is most useful in the treatment of a subject which has an essentially international character. Dr. König has made good use of English and American authorities, and has understood them well. A few points are open to criticism. A word might have been said on implied warranties (e. g. the warranty of seaworthiness). The exceptional character of contracts of marine insurance and fire insurance as contracts 'uberrimae fidei' might have been pointed out, as the discussion on misrepresentation and concealment of material facts might have become clearer from it. The rights arising from a marine policy are not transferred without assignment ('ohne Cession'). We miss a reference to some important Statutes, as 19 Geo. II. c. 37 and 31 & 32 Vict. c. 86. If we consider the mass of material Dr. König has had to master, these seem minor matters, which do not lessen the great merit of his work. The concluding portions of the third book deal with Credit Transactions (we should rather call them Banking Transactions; they include Loans, Deposits, Open Credits, Current Accounts, and the law of Pledges), and the modes of payment (set-off, payment into a banking account, clearing system, cheques, letters of credit, etc.); they are written by Professors Grünhut and Cohn.

The fourth book gives a detailed account of Maritime Law (including Marine Insurance from a specially German point of view), and the fifth book has the law of Bills of Exchange. The first part of this last book is written by Professor Kuntze; it contains some very interesting historical material, but there is a tendency to speculative divagations, which does not fit into a practical handbook. We are the last to deny the high importance of the logical analysis and systematization of legal conceptions, but they should only be the means to an end, not an end in itself. If, for instance, we examine Prof. Kuntze's 'Creationstheorie' (the theory according to which the drawer of a bill of exchange, by the mere fact of drawing it, *creates* an obligation without the concurrence of another party) quite independently of its theoretical justification, and merely with a view to its practical application, we cannot discover any rule of law which its adoption would alter, or any difficulty it would solve.

On the whole, we think Prof. Endemann's 'Handbuch' will be a very valuable edition to the literature of Commercial Law. There is no doubt a certain want of proportion in the prominence given to individual subjects, and too much latitude has perhaps been allowed to the contributors, as to the method to be adopted. On the other hand, we suppose that the imposition of strict injunctions in these respects, would have deterred many from giving their assistance. Some subjects might perhaps have been included, which would have made the book more complete; for instance, a short summary of bankruptcy law and a brief review of the main features of civil procedure, with special attention to the 'Urkundenprozess' and to the organization of the commercial divisions of the Courts, as well as to the

circumstances under which they have jurisdiction. Otherwise, the selection of the subjects seems a good one. English readers, who wish to have a complete survey of the literature and the leading theories on any particular branch of German commercial law, will be able to find it in Professor Endemann's work in a most convenient and accessible form.

A Treatise on the effect of the Contract of Sale on the Legal Rights of Property and Possession in Goods, Wares, and Merchandise. By Lord BLACKBURN. Second Edition by J. C. GRAHAM. London: Stevens & Sons. 1885. Large 8vo. xxxix and 595 pp.

A SALE of goods, reduced to its commonest expression, consists of two successive steps: first, the ascertainment of the specific goods to be sold, upon which the property in them forthwith vests in the purchaser; secondly, the subsequent delivery of possession in exchange for the payment of the agreed price. But in the interval between these two stages it may happen either that the goods are accidentally lost or destroyed, or that the purchaser becomes insolvent. In the former case the loss falls on the buyer, who must pay for the goods which had become his previous to their destruction; in the latter it falls on the vendor, who can only recover a dividend on the purchase money of the goods which have passed to the purchaser's assignees. In other cases, where the price has been wholly or in part paid, but the property in the goods has not been transferred, the purchaser may incur a like loss by the insolvency of the vendor, since he has not obtained the security of the goods, and can only get back a dividend on the money he has paid. These rights and liabilities are again liable to modification by the vendor's rights of lien and stoppage in transitu, as well as by various forms of express conditions and stipulations. Hence the importance of ascertaining how the right of property in goods is affected by contracts of sale. And just this was the precise scope of Lord Blackburn's Treatise on the Contract of Sale of Goods, published in 1845. Setting on one side exceptional cases, such as the transfer of interests in ships, deeds of title, shares, stock, &c., and discarding matters belonging to the general law of contracts, as Mutual Assent and Consideration, as well as the consideration of rights exercisable after the complete fulfilment of the contract, as e.g. rescission on the ground of fraud, the author confined himself strictly to the above defined subject-matter under the threefold inquiry, (i.) what is necessary to satisfy the Statute of Frauds so as to render valid a contract for the sale of moveable corporeal property, (ii.) what agreements amount to a bargain and sale, so as to pass the property, and what are executory only, (iii.) what are the rights reserved to a vendor who has transferred the general property in the goods to the purchaser, but has not yet delivered possession of them to him.

Nothing could exceed the logical exactitude with which the author adhered to his theme,—the effects of the contract on the property in the goods. It would have been interesting, therefore, to have been told in the preface to this the first re-issue after forty years of so classical a work, the editor's reasons for having departed in any respect from the original scheme of the book. He has done so in inserting (pp. 165–170) a discussion on mistake as to the person or subject-matter of the contract, which belongs rather to the general law of contracts, and is not in place, even when introduced for the purpose only of comparison and distinction, in a section on the subsequent appropriation of goods to the contract. He has done

so again in inserting the whole of the fourth chapter of Part III (pp. 508–536), dealing with the subject of the recovery of damages and interest for breaches of the contract, a matter but indirectly connected with the *jura in rem* acquired under the contract. We may well admit that these additions may increase the value of the work as a practical treatise, though at the expense of its logical symmetry; but if that were the motive of their insertion, it is difficult to see why other considerable branches of the law of sales of personalty, such as e.g. that relating to the effects of Fraud, were not also incorporated.

For the most part, however, it is fair to say that the editor has adhered to his author's plan. Thus the forty-three pages (pp. 198–241) added to the section on express conditions precedent to the passing of the property, viz. those as to payment, quality, quantity, time, arrival and delivery, insurance, &c., though at first sight only loosely connected with the subject, inasmuch as most of the cases dealt with did not raise directly any question as to the right of property, yet on careful examination will appear to have a close connection with the rest of the section, inasmuch as the breach of a condition going to the performance of the whole contract does in most cases, if insisted on, constitute a bar to the passing of the property, although the dispute which has arisen may not have brought any question as to the *jus in rem* into relief. The entirely new chapter (pp. 268–310) on Equitable Interests and Assignments is obviously within the spirit of the author's plan, more especially since all the Divisions of the High Court have acquired the power to deal with the equitable rights arising in any case; it therefore constitutes a most valuable addition to the book, and none the less so that the transactions which formed the subject of many of the cases there cited would, if they took place now, be held to have given rise to legal interests or choses in action and legal assignments, instead of equitable.

The editor describes the various ways in which such interests arise, and then deals with the subject with admirable clearness under the three heads of (i.) creation of the equitable interest, (ii.) assignment of the same, and (iii.) the application of the doctrine of *Ex parte Waring*[1] in the case of double insolvencies. Again, the considerable addition made to the chapter on Remedies (pp. 484–507) is probably sufficiently cognate to the original plan to justify its insertion. The editor there discusses the alternative remedies of the vendor where the vendee has dispensed with tender (viz. either to sue forthwith for damages as for a breach of the contract, or to decline to treat the vendee's refusal as a breach and insist on the performance of the contract); the various modes of ascertaining the rights of the vendee where there has been no tender (including the *quasi* specific performance which may be obtained under the little known sec. 2 of the Mercantile Law Amendment Act, 19 & 20 Vict. cap. 97); the rights of the vendor by reason of the vendee's non-acceptance; and finally, those arising on a breach of warranty discovered after acceptance, with a statement of the difference in this regard between a contract to deliver specified and one to deliver unspecified goods answering only to an agreed description.

The author's method was always first to expound the principles which he deemed deducible from the decisions on any given point, and then to proceed to illustrate them by a review of the decided cases in their order, stated with sufficient fulness to exhibit clearly the point of the decision, and so as to indicate the stages of growth through which the doctrine had

[1] *Ex parte Waring*, 19 Ves. 345, 2 Rose, 182.

passed. This method has been followed with great success by his editor in his expansion of the work, his expositions of principle being singularly clear and correct, and the work of setting out the cases in proof of principle leaving nothing to be desired. A large part of his work has necessarily consisted in adding in their proper places the large number of decisions which have accumulated during the last forty years. Besides this, he has in many cases supplemented the author's authorities by setting forth reported cases which might have been inserted in the first edition, and which, for whatever reason omitted, he has rightly considered to have a bearing on the subject. In some cases he has altered the original text, either by rearranging the order of a particular section (as in the cases of express conditions and property by estoppel and appropriation by election and adoption), by omitting passages which have become since the date of first publication invalid or irrelevant, or by expanding expressions of the author which occasionally, from the severe conciseness of his style, rival some morsel of terse Latinity in their power of taxing the attentive scrutiny of the reader. He has adhered to the now usual plan of distinguishing the new matter from the old by brackets; but it is a testimony to the difficulty of carrying it out with consistency that, putting aside cases of accidental omission of these marks (as e.g. at pp. 21, 38, 44, and 122), it is occasionally necessary to modify the original text in a way which cannot be conveniently indicated by such signs, as e.g. where some connecting particle or phrase has been dropped or some new one has to be substituted, or where for some other reason the text has been remodelled without notice (as e. g. at pp. 22, 183), so that if anything should turn on the author's *ipsissima verba*, the new edition cannot be safely relied on to show what they were.

On the whole, however, we have no hesitation in saying that the work has been edited with remarkable ability and success, and if we may hazard a speculation on the cause, we should say that the editor has so diligently studied the excellent methods and work of his author as to have made himself a highly competent workman in the same kind.

Our Administration of India, being a complete account of the Revenue and Collectorate Administration in all departments, with special reference to the work and duties of a district officer in Bengal. By H. A. D. Phillips. London: W. Thacker and Co. 1886. 8vo. xvi and 240 pp.

The author of this work has already published two other Manuals, one of Revenue and the other of Criminal Law, for the use of members of the Civil and of the Uncovenanted Service. In the volume before us he sketches with great clearness the outline and expounds the principles of the actual administration of a district in Bengal, Behar, or Orissa, with especial reference to the work of a Collector. We fear that the ideas of the average British householder about the duties of the above-named official are still obscure and hazy. A Collector in India is supposed to bear some resemblance to the functionary of the same name in England, who is always calling at inconvenient times for payment of rates and taxes, and also is vaguely supposed to be a consenting party to the increase of unnecessary Board Schools and to the wicked extravagance of a vestry. It is the object of Mr. Phillips to dispel such erroneous notions, as well as to supply the young civilian with a useful manual of one very important branch of his active duties. In this he has succeeded very well. The book is not too long. The divisions of such sub-

jects as the revenue derived from land, from the excise, from the salt licence and the stamp duties, are precise and distinct. The statistics and figures are taken from the most trustworthy sources, and are just sufficient to illustrate the narrative, and to lead to reasonable and sound conclusions without overwhelming the text and alarming the reader. It will be well for critics and students to bear in mind that the district officer in his main capacities is the very backbone of a good Indian Administration. He is the head of the police; he exercises considerable judicial powers; he collects or is accountable for the public revenue of a district in all its branches; he represents the Court of Wards in the cases of minors when heirs to landed estates; and he makes reports of all kinds, regarding the rain-fall, the prospects of the two harvests of the year, the expansion of trade, the increase and distribution of the population, and divers other matters intimately connected with social economy, public order, and material and moral progress. In a general way it may be said that he attains these objects by assiduous work in office for nine months, and by moving about in tents throughout his district for the remaining three months of the year. It will be necessary also to recollect that Mr. Phillips' service has been passed in Bengal, a part of Behar, and a district of Orissa; and that though there is a considerable family likeness in the work done by all district officers, whether in the Punjab, the North-West Provinces, Bombay and Madras, or Lower Bengal, yet the book is not intended to give the beginner minute instructions for making a village Settlement, nor to lay down the law as to the best mode of dealing with aggressive frontier tribes. The author's experience has been acquired in highly-cultivated and densely-populated districts, where the jungle has given way to the rice-field, the orchard, and the garden, during a century of peaceful administration, and where the growth of country produce, the development of agriculture, and the expansion of trade by road, rail, and river, have been literally enormous.

We have not space to do more than note the principal topics with which this Manual deals. There is a short chapter on a very difficult and a very complicated subject, the relation of landlord to tenant and of both to the State. Fully to comprehend the rights and obligations of these three parties, it would be necessary to go through the celebrated Fifth Report of the House of Commons of 1812, the discussions which led to the passing of Act X. of 1859, 'the Magna Charta of the Ryot,' and the Blue and Green books which bore fruit in the Bengal Tenancy Act of last year. But Mr. Phillips' sketch is good as far as it goes. There is some valuable information on the Revenue not derived from land, the License tax, and the Registration of landed tenures. In this latter department it is clear that India is far ahead of England, and that the difficulties about an accurate title and a cheap transfer in India arise from the corruption and trickery of the native community, and not from the carelessness or inattention of Government. There are also some curious details about the Census of 1881, which was very naturally an improvement on that of 1872. We have only room to state that the Lieutenant Governor of Bengal rules a population of nearly seventy millions; that the cost of making the Census was light; that the population of Behar is about five hundred to the square mile; that Bengal Proper, though closely packed in some districts, shows a less average: and that in the whole of India there are twenty millions of widows, all of whom married at a very early age, while the greater number, by the inexorable laws of caste, are condemned to a life of drudgery and wretchedness, varied, as might be expected, by allurements to vice, crime, and degradation. The occasional aridity of this analysis of

laws, regulations, and official statistics is further relieved by a graceful and picturesque sketch of a village in the agricultural districts of Bengal. Nature is not exactly the same in the undulating and half-cleared districts of Western Bengal and on the banks of the large and navigable rivers such as the Poddha and the Megna to the East. The former districts have a rain-fall of some fifty inches, and the latter one of nearly double the amount. But there is a bewildering uniformity in villages just outside Calcutta, and in villages of Jessore, Nuddea and Moorshedabad a hundred miles off.

Mr. Phillips here and there indulges in some political remarks as to the noisy behaviour of the Native Bar, the unmerited aspersions cast on hardworking civilians, and the diatribes and misrepresentations of such agitators as Mr. Seymour Keay, Col. R. D. Osborne, Mr. Wilfrid Blunt, and Baboo Lal Mohun Ghose. As a general rule, a writer of manuals or publications, based mainly on official records, need not display his political bias. But Mr. Phillips, looking to recent agitation and the policy of the late Viceroy, is not without excuse. His deductions and ideas are generally sound. He writes in an honest and a fearless spirit. Published at a time when an enquiry into the Crown Administration of India seems both necessary and imminent, the work ought to be of use to such persons as approach the enquiry in a spirit of impartiality and candour. It confirms the view taken by many experts of the inestimable value of the District Officer as a link between the Government and the people, and of the impolicy of Lord Ripon's ridiculous schemes for educating the native community by letting it do costly and bad work, and lowering the position and influence of the Collector-magistrate. It may be commended to passed candidates for the Indian Civil Service as well as to members of the newly elected Parliament, though it might be ungracious to ask how many of the latter body will be able to construe the Greek quotation with which the work fittingly ends, or to recollect the context of the chorus in the Agamemnon from which it is extracted.

Reports of Cases determined by the High Court of Admiralty and upon Appeal therefrom. Temp. Sir THOMAS SALISBURY and Sir GEORGE HAY, Judges, 1758–1774. By Sir WILLIAM BURRELL, Bart., LL.D., &c. Together with Extracts from the Books and Records of the High Court of Admiralty and the Court of the Judges' Delegates, 1584–1839; and a Collection of Cases and Opinions upon Admiralty Matters, 1701–1781. Edited by REGINALD G. MARSDEN. London: W. Clowes & Sons, Limited. 1885. 8vo. 415 pp.

THE Black Book of the Admiralty was discovered, we believe, in some cellar under Somerset House, and the first part of the present volume seems to have lain in a similar concealment, but in a pleasanter place—the library of West Grinstead Park. Here the MS. of the collection has, we suppose, been since Sir William Burrell placed it on the shelf. This gentleman seems to have not only been a practical advocate, but also a lover of antiquities, and it would be gratifying to him to know that after so many years' repose his notes had found their way into print. The entire volume is solely of antiquarian interest; it can be of no use to the practitioner, but it helps to show what was the jurisdiction of the Admiralty Court and the state of Admiralty Law at the time when the cases which it contains were

decided. Hence it forms a not unimportant contribution to the history of English law, and should find a place in every law library that aims at completeness. It is interesting, for example, to notice that whereas in 1769 the cardinal rule that liens rank in the inverse order to their attachment was in doubt, in 1774 it appears to have been settled. For in the first-named year, in the case of *Dunlop* v. *The Proceeds of the Neptune*, a bottomry bond which was first in date was given precedence over a later one by Sir T. Salisbury; but in *Mackenzie* v. *Ogilvie*, five years later, Sir G. Hay decided in an opposite direction, although the case of *Dunlop* v. *The Neptune* was cited before him. The principle has for many years been undoubted, and therefore the first case is not of authority, and the second only an example of familiar law. But this does not detract from their interest as a contribution to the history of our maritime law.

The inclusion of the extracts from the records of the Court of Admiralty in this volume is probably to be explained as a compromise. They may have been thought worth publishing, but not quite worth publishing apart. They have, at any rate, no connection with the previous cases. The first document is the copy of a letter from Queen Elizabeth to the Chief Justice of England, with reference to the jurisdiction and business of the Admiralty Court. But this letter is simply a warning to the Common Law judges to take special care not to try cases which fell within the jurisdiction of the Admiralty Court. It in no way increases the knowledge of what that jurisdiction was; it is, in fact, little more than evidence of a conflict between the judges of the civil and the common law.

The more we know of our own history the better, and so it may fairly be said that Mr. Marsden has done good service in making these materials accessible to legal and historical students. We do not find it explained upon what principle the selection from the records has been made. Those who wish to study the subject thoroughly might have been provided with some indications as to the nature and value of that which is not published, We must presume, however, that the selections are in the editor's judgment sufficiently typical.

Code of Evidence introduced into the Assembly at the Session of 1885; *being the Fourth Part of Code of Civil Procedure reported complete by the Practice Commission in* 1850. With Notes and References. By Charles D. Baker. New York: Martin R. Brown. 1885. 24mo. 145 pp.

The Legislature of New York has been desperately and ineffectively 'grappling'—to use the popular word—with the problem of making a code of the civil law. As a beginning, they enacted 391 sections in 1848. Two years later a complete code of 1885 sections was prepared, but the sample had been liked so little that the bulk was never accepted. In 1870, by way of experiment, another complete code was proposed to be substituted for the existing fragment. It had 3556 sections, and has not been passed. Now Mr. Baker reverts to the code prepared in 1850, and republishes the 224 sections of it which deal with the law of evidence. His volume is nicely printed and of a size suitable for the waistcoat pocket.

The code begins, as might be expected of a code prepared in 1848, with philosophy, and very bad philosophy too. The fifth section says: 'The law does not require demonstration, that is, such a degree of proof as, excluding possibility of error, produces absolute certainty; because such proof is rarely possible. Moral certainty only is required, or that degree of proof

which produces conviction in an unprejudiced mind.' This section has many faults, of which the first is that it is there at all. If it only means that different things can be proved with different degrees of certainty it is useless, because everybody knows that that is so whether the law likes it or not. If it means anything else it is a bad piece of law, and can only do harm. In the next place it gives a reason for its enactment, contrary to Bacon's wise maxim, 'incipiat a jussione.' In the next place, the reason is not true. 'Such proof' is not 'rarely possible,' but quite impossible, because all evidence appeals to the senses, and the senses may be deceived. Then the section attaches some significance to the meaningless expression 'moral certainty.' And finally it begs the question in the word 'unprejudiced.' The next section enacts that 'there are four kinds of evidence: (1) the knowledge of the court; (2) the testimony of witnesses; (3) writings; and (4) material objects presented to the senses.' The fact that the court takes judicial notice of the days of the week, and of the statutes of the Legislature, is not a kind of evidence. A writing is a material object presented to the senses. The code might as well have divided writing into writing in ink and other writing, and made five kinds of evidence instead of four. Indeed it would be quite easy to make five hundred kinds in this haphazard way. The 'testimony of witnesses,' which really means the fact that certain sounds are heard by the ears of the court or jury, is also in one sense a succession of material objects presented to the senses. At least there is no apparent reason why a sound-wave striking on the tympanum should not be called a material object.

This division of the 'kinds of evidence' is not more crude and illusory than the division, which immediately follows it, into 'degrees of evidence.' Section 7 is as follows: 'There are several [!] degrees of evidence: (1) Original and secondary; (2) Direct and indirect; (3) Primary, partial, satisfactory, indispensable, and conclusive.' The use of the word 'several' in a statutory enactment shows how little thought went to the making of this code. The authors were modestly conscious that they had not dealt exhaustively with the 'degrees of evidence.' But the explanations are as bad as the enumeration. '§ 8. Original evidence is an original writing or material object introduced in evidence.' It will be remembered that original evidence means evidence of the original degree. But what 'original' means the codifiers did not think it worth while to say, probably because it had never occurred to them that they did not know. 'Material,' too, is a bad word for a definition. No one knows with any approach to accuracy what it means in the sense in which it is obviously used here, and it has the disadvantage of being also frequently used in the sense of 'relevant.' The two following sections deal with direct and indirect evidence. 'Direct evidence is that which proves the fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively establishes that fact.' There is no such evidence. Proof is nothing but inferences, and there cannot be evidence which proves a fact without an inference. Let us take an example. The question is whether *A.* cut *B.*'s throat. *C.* says, 'I saw *A.* cut *B.*'s throat.' This statement is as direct as it can possibly be, but 'without an inference' it proves nothing. From the fact that *C.* makes this statement, the jury infer that *C.* now remembers that a certain impression was made on his eyes. From the inferred fact that *C.* has this recollection they infer that the impression really was made on his eyes. From the fact inferred at two removes that an impression was made on *C.*'s eyes, they infer that *A.* cut *B.*'s throat. To talk of proof without an inference is ridiculous.

It may be urged that the insertion in a code of all this nonsense about

'kinds' and 'degrees' of evidence does no harm. This is not quite so. It is quite possible to do injustice by diverting the minds of those who have to deal with facts to the question under which class the evidence given comes. The real question is always 'What conclusion do I, as a sensible man, draw from the various matters which I have seen, heard, felt, tasted, or smelt?' All evidence is of one kind, or, which is much the same thing, every piece of evidence is of a different kind from every other piece. There is no royal road to a proper estimate of its value.

The last offence of the code to be mentioned here is that section 48 directs the court to take judicial notice of 'the laws of nature.' So far as concerns the preliminary part of this legislative scheme the people of New York showed great good sense in 1850 in refusing to have anything to do with it, and it is much to be hoped, in the interests of legal science, that they will do so again.

A Guide to the Criminal Law at the Bar Final and for Students generally. By CHARLES THWAITES, Solicitor. London: George Barber. 1885. 8vo. 86 pp. *The Student's Guide to the Principles and Practice of the Common Law.* By JOHN INDERMAUR, Solicitor. London: George Barber. 1886. 8vo. 124 pp.

IT appears from the prefatory advertisements of these little books that they are the second and third members of a series of four in course of preparation by Messrs Indermaur and Thwaites, which is eventually, in a 'consolidated' form, to supply all the information which, in the authors' opinion, is necessary to enable a student to pass the examination which they describe as the 'Bar Final.' If the Bar Examination is in any degree a better test of fitness for the call to the Bar than the mere eating of dinners which it was devised to supplement, and if the two works now under consideration are fair specimens of the series of four, the series will entirely fail in its object. No one expects to find literary skill, legal erudition, or scientific explanations in a Student's Guide, and it is no reproach to Messrs. Indermaur and Thwaites that no faint reflection of any one of the three is ever permitted to illumine their pages. What the student has a right to hope for is information, reasonably correct as far as it goes, upon notorious topics of examination. Instead of this, Messrs. Indermaur and Thwaites—there is nothing to choose between them—present their customers with a bewildering succession of gross elementary blunders, of which it would be impossible to give a complete account without quoting from every page. A few examples, selected at random, will justify the description.

Both writers are oppressed by a strange delusion that 'every crime necessarily includes a tort,' or, as one of them beautifully says, seduced by the pseudo-logical ring of his fictitious antithesis, 'all crimes are torts, but all torts are not crimes.' To do them justice, they do not mention as instances homicide, perjury, blasphemy, enlistment in the service of a belligerent power when England is neutral, or offences against morality generally. A crime is elsewhere defined as 'a wrongful act affecting the public.' It would not be easy to mention many crimes which can fairly be said to come within both branches of this definition. None of the crimes just mentioned are wrongful (i. e. tortious) acts; and most of the crimes which are wrongful acts do not affect the public in any especial degree. 'A tort as distinguished from a breach of contract may be defined as a wrongful act consisting of the violation of a right independently of the existence of any contract.' It may: and a hen's egg may be defined as the

egg of a hen. Mr. Thwaites (p. 6) describes the 'intention to commit high treason' as an 'indictable crime.' Treason which consists of an intention can hardly be intended to be committed, and the intention to commit treason of other kinds is not in itself criminal. It is impossible to imagine any one intending to imagine the Queen's death without doing it; while intending (for instance) to slay the Chancellor doing his office is not an indictable offence. Mr. Indermaur asserts (p. 83) that an action of deceit will not lie unless the plaintiff has been induced to make a contract. Mr. Thwaites indicates (p. 7), though he does not say in so many words, that felonies are not, as a rule, triable at Quarter Sessions. Perhaps he does not know that larceny is felony. Almost in the same paragraph he states generally that 'a new trial may be obtained in cases of misdemeanour.' For this surprising proposition he quotes *R.* v. *Mawbey*, 6 T. R. 638. In this well-known case, which was decided in 1796, the Judges of the King's Bench, it is true, used expressions which, taken alone, might seem to justify Mr. Thwaites' assertion. But the case was a very peculiar one, in the nature of a road-indictment, and had been removed into the King's Bench by *certiorari*, and sent down to the assizes for trial as a nisi prius record (but for which it could not have been argued in the King's Bench at all). The Court said they had power to grant a new trial, but refused to do so on the merits. For general purposes it is perfectly safe to say that there can no more be a new trial for misdemeanour than for felony. Mr. Indermaur, who is especially strong in definitions, observes (p. 82) that 'A tort is an injury to private rights remediable by action for damages and arising out of contract or not;' from which it appears that in his estimation not only are all crimes torts, but all breaches of contract are also torts. '*Injuria* signifies a legal injury for which an action may be maintained. *Damnum* signifies some damage or harm not necessarily enforceable at law.' More intelligible but also more wildly wrong is Mr. Thwaites' statement that the 'bare concealment' of felony is misprision. That part of the 'Guide' which refers to slander contains many curious assertions, of which not the least startling is the statement that 'in order to maintain an action of slander . . . the facts to be proved are generally three:—(1) The uttering. (2) Malice. (3) The damage caused.' It is a pity to introduce a perfectly new doctrine of 'malice' into the law, and if it must be done it would be well to explain in which of its existing senses or in what new one the word is used. Among other information on the subject of Practice we are told that the effect of giving notice to admit documents at the trial is 'that if the party to whom the notice is given admits the documents they are then admissible.' Of course the admissibility of documents as evidence is a matter with which notices to admit have no more to do than summonses to take evidence on commission. These specimens ought to suffice to show that these two little books contain an astonishing number of blunders of amazingly fine water, and, whatever may be their value for the purposes of examination, are perfectly worthless as Guides to any one who wishes to know anything about law.

Gray's Inn: its history and associations: compiled from original and unpublished documents. By WILLIAM RALPH DOUTHWAITE, Librarian. London: Reeves and Turner. 1886. 8vo. xxiii and 283 pp.

IN this handsomely produced volume, which puts to shame the mean sham Roxburghe back lately introduced for Record Office publications, the librarian of Gray's Inn has done a pious work that might well be imitated elsewhere. It would be foolish to pretend that the book will be found amusing by or-

dinary readers, or that many things in it are not of a very limited local or genealogical interest. But these are just the things which need to be once for all set in order by a competent hand, and made available for the time when they will fit into the historian's or philosopher's work. Things of general interest take care of themselves. The world will not forget that Bacon was an ancient of Gray's Inn, or that the *Comedy of Errors* was performed, it seems for the first time, in that Society's hall. It is quite proper for Mr. Douthwaite to repeat these points; but the real reason for the existence of his book lies in those which the world has no time to remember. So far as the history of Gray's Inn runs parallel with that of the other Inns of Court, Mr. Douthwaite only confirms our belief that we shall never know much more than Dugdale and Fortescue tell us. But it is something to have set out to one's hand from Waterhouse's Commentary on Fortescue the report made to Henry VIII. by Nicholas Bacon and others, on which we are dependent for the true derivation of the term *barrister* (see the New English Dictionary *s. v.*). Gray's Inn, at one time the largest of the Inns of Court, is now the smallest, probably because of its comparative remoteness from the modern centres of legal activity. But in one way the loss has been a gain, for the concentration and seclusion have done much to preserve the collegiate character which in the other Inns had almost died out, among the juniors at any rate, and of late years has been only partially revived through the institution of common-rooms. The Gray's Inn Moot Society, which has now flourished for ten years, is the most conspicuous result of this tendency, and an excellent one. It is not much to the credit of the other Inns or of the Council of Legal Education that no sort of official recognition has been given to the example set by Gray's Inn, which might naturally and properly have been made the nucleus of a systematic revival of the ancient exercises in a form adapted to modern requirements. But it is difficult to organize teaching, and easy to multiply examinations; and in the Inns of Court, as elsewhere, the false pattern set, with the best of intentions, by the founders of the University of London has been copied with disastrous results.

We do not profess to have verified Mr. Douthwaite's authorities, except so far as they are familiar to any one who has turned over Dugdale's *Origines*; and many of them, indeed, are unpublished. But there are various internal evidences, as all scholars know, by which one can make a fair guess; and we do not think any trained reader will have much difficulty in satisfying himself that Mr. Douthwaite has executed his undertaking in a workmanlike and trustworthy manner.

A Treatise on the Principles and Practice of the Supreme Court Code [New Zealand]. By Charles James Foster, Christchurch, N. Z. Alfred Simpson. 1885. Large 8vo. lx and 385 pp.

Dr. Foster's commentary upon the New Zealand Supreme Court Code is described by him as being 'founded upon the Home Authorities under the Judicature Acts and Orders of 1873 and 1875, and upon the English Practice generally at Common Law, in Equity, and in the Probate Court.' It would appear from the substance of his work that the main alterations in the law effected by the English Rules of 1883 have been adopted in New Zealand. The colonists, however, have not been content with this, but have introduced, at what precise time Dr. Foster does not expressly state, certain reforms which have at different times been advocated here, but have not yet secured adoption. For instance, he tells us that the

party filing any pleading 'may at once be called upon to verify it in detail by oath, and the issues will thus be insensibly narrowed down to the facts really in dispute.' For this large innovation it may safely be said, that we in England are not yet prepared. If it has been in operation in New Zealand sufficiently long, it would have been interesting to learn from Dr. Foster how it works in practice. The notice to admit facts, which the New Zealanders do not appear to have borrowed from our existing Rules, probably effects much the same purpose, without promoting hard swearing in an equal degree, and without unduly trenching on the right which a litigant ought to have of putting his adversary to the proof of matters about which he is by no means prepared to verify his own contentions on oath. We are also told that by the New Zealand Code, causes 'always may, and in the large majority of cases certainly will be tried without a jury.' There are many cases in which it is so unlikely that both parties would consent to try before the judge only, that it may be hypercritical to suggest that in some of them no judge ought to be required to find the facts on his own responsibility. As to the prophecy, experience in this country hardly bears it out, as the number of cases set down for trial without a jury in the Queen's Bench Division, including those entered in the Chancery Division, and transferred for trial, sometimes does not equal, and never considerably exceeds the number of those in which a jury is asked for. Dr. Foster especially congratulates his countrymen upon the existing provisions as to costs, whereby, he says, 'an intending litigant can now approximately calculate not merely his prospects of success, but what is scarcely less important, the expense.' This seems to imply that the difference between costs as between party and party, and costs as between solicitor and client, is less considerable or less generally understood than is the case with us. As in England, the judges are now empowered to make a successful party pay his opponent's costs.

Dr. Foster's presentment of the 'Civil Code' of New Zealand resembles in general plan an edition of our own Rules of Court, with notes embodied in the text. It is, of course, less of a practical handbook and more of a scientific treatise than works of the class of which the 'Annual Practice' is the fullest and most elaborate specimen, but in arrangement it bears a considerable general likeness to them. It is divided into seven parts, wherein actions, and the things thereunto belonging and resembling, are methodically traced from the cradle of the writ to the grave of costs and litigation *in formâ pauperis*. One part deals with the 'Extraordinary Remedies,' known here as injunctions and prerogative writs. The text of the New Zealand Rules of Court is not separately given, though the addition of an appendix, entitled 'Rules Not Set Out in Text,' suggests that the whole, with a few exceptions, must be embodied in the preceding chapters. The authorities cited in explanation appear to be, almost if not quite without exception, English. Some of them are little more than local in their application, for instance the decision in *Curtis* v. *Marsh*, that at Dorchester the expression '10 o'clock' meant 10 o'clock at Dorchester, and not 10 o'clock at Greenwich. It would probably be within the province of the New Zealand Legislature to make a uniform time for New Zealand if it thought proper. Taken altogether, Dr. Foster's book presents a skilfully prepared and well-written summary of the law and practice of New Zealand. But it is strange to an English reader to be dependent upon footnotes only for the knowledge whether any given sentence is part of the written law, or part of the author's disquisition upon it.

Institutes and History of Roman Private Law. By Dr. Carl Salkowski, Professor in the University of Heidelberg. Translated and edited by E. E. Whitfield. London: Stevens and Haynes. 1886. 8vo. xxviii and 1048 pp.

The idea of giving English students of Roman Law an opportunity of becoming acquainted with the German 'Institutionen,' or elementary manuals of that law and its history, was well conceived, and the selection of Prof. Salkowski's work for the purpose was judicious: for it follows so far as possible the excellent plan of letting the Roman texts tell their own tale in the original, without being so long and elaborate as Puchta, Kuntze, and other writers of similar text-books. As an example of logical arrangement of topics and the matter relating to them it is almost unsurpassed; but much of the merit of the German has in this case been lost by the cumbrousness of the English replica, for while the reader of the original had before his eyes a conspectus of the rules on any given subject within the compass of a page or two, they are here spread over a much larger quantity of paper, and reference from the author's exposition to the Latin citations by which it is established or illustrated is far less easy and convenient. We can readily imagine an English student remarking to himself that if this is an elementary manual of Roman Law, Roman Law is not for the like of him.

Besides translating both Salkowski's German and the Latin texts, Mr. Whitfield has added, in the form of marginal notes, abundant references to foreign as well as English works on Jurisprudence, English and Roman Law. We are inclined to think that these are the most valuable part of the book: for much care and judgment are shown in selecting these guides to more advanced reading, and if a man reads even a moiety of the authorities to which he is referred he will have got some way past an elementary knowledge of his subject. Upon the general execution of Mr. Whitfield's task we cannot pronounce a very favourable opinion. When he is on the firm ground of law, the German text has not suffered much in translation; but he is clearly unable to cope with the subdued transcendentalism with which no German book on a learned subject can afford to dispense, and his selection of English equivalents for technical terms very often suggests that he does not understand the topic with which he is dealing. The first portion of the book (on 'The Elements') supplies numerous illustrations of the first defect. For instance, we read (on p. 4) 'what is called an institute of law is the simple sum of the legal relations regarding what is common to them:' (on p. 21) 'by analogy is understood that application to similar cases of a law which, derived from its intrinsic sequence, is according to its essential principles:' both of these definitions or sentences are to an ordinary reader perfectly meaningless, for the sense of the original is not rendered. The justice of our second piece of criticism is perhaps sufficiently vindicated by the translation of 'Rechtsmittel' by 'legal remedies:' of 'Pfandrecht' by 'pledge-right:' of 'Notherbrecht' by 'necessary inheritance:' of 'Gesetzlich' by 'legal' (instead of 'statutory' or 'based on the Twelve Tables'). But the most unsatisfactory part of the book is the translation of the Latin text, which shows the editor (whether as scholar or Romanist) to be very insufficiently qualified for his task. Where he could avail himself of assistance, as in dealing with passages from Gaius' or Justinian's Institutes, he is in general fairly correct; but immediately he passes to the Digest, Code, or non-legal writers his troubles begin, and it is no exaggeration to say that unpardonable mistakes are sown broadcast through his pages. Want of space prevents our pointing out a tithe of

them, but the following are a few specimens taken at random from all parts of the translation :—

Sive solvendo sunt bona sive non sunt, 'Whether the succession admit or not of valuation' (p. 25): se circumvenire, 'to overreach themselves' (instead of 'one another,' p. 93): arbitrariae actiones, 'capricious actions' (p. 128): actio rei persecutoria *or* rei persequendae causa comparata, 'suit for a specific thing' (*passim*): nec jurare nec jusjurandum referre, 'neither to make oath nor to be willing to answer the oath' (p. 140): si hereditas lapsa sit, 'if the inheritance has fallen through' (for 'fallen in value,' p. 152): actio restitui debet, 'an action ought to be given for reinstatement' (p. 157): quamquam alii, antequam nascatur nequaquam prosit, 'although in no way benefiting another before it is born' (p. 161): nec possideri intelligitur jus incorporale, 'not even is the possession of an incorporeal right supposed' (p. 363): fundus, 'a farm' (p. 375, &c.): in communi dividundo judicio nihil pervenit ultra . . . et si quid in his damni datum factumve est . . . 'even if an injury has been inflicted or done to them' (p. 681): ea quae per infitiationem in lite crescunt, 'sums which accumulate in a suit through disclaimer' (p. 684): pactorum quaedam in rem sunt, quaedam in personam, 'some agreements relate to the thing, some to the person' (p. 712): bonorum possessionem petere 'to *sue for* the possession of goods' (p. 777, &c.): quorum imaginarius usus est, 'of which only fanciful use is made' (for 'whose use is merely imaginary,' p. 801): antequam in suam tutelam venit, 'before he entered into his tutelage' (with a still more strange editorial gloss, p. 810).

The Contract of Marine Insurance. By CHARLES MCARTHUR. London: Stevens and Sons. 1885. 8vo. xxiii and 351 pp.

IN this book, which, as appears from the preface, is the development of a smaller work by the same author, we have an old friend with a new face. Mr. McArthur claims as the distinctive feature of his work, as compared with other treatises on the subject, 'including the great work of Arnould,' the examination piece-meal of that most ambiguous yet universal instrument, Lloyd's policy. If there is any doubt as to whether Mr. McArthur's treatment of the subject of Marine Insurance will be found as acceptable to the practical man of business as the careful and thorough manipulation which it has received at the hands of Park, Marshall and Arnould, there can be none whatever as to which method will find the greater favour in the eyes of practical lawyers. The common form of Lloyd's policy, however much it may be respected and cherished by those who have most to do with it, has at all times, as Mr. Justice Buller declared nearly a hundred years ago (since which time there has been no alteration in the form, except in its opening words), been considered in courts of law as an absurd and incoherent instrument; and therefore such an instrument is by no means adapted, from a legal point of view, to the treatment it has here received.

In consequence of this novel system, any matters which are outside of the common form of Lloyd's policy, except so far as they come under the miscellaneous clauses which at times find a place in such a policy, are almost unnoticed in Mr. McArthur's book. Thus, as in Mr. Lowndes' Treatise on Marine Insurance, the subject of Mutual Insurance Societies or Clubs finds practically no place in it. This is a very important omission, and, should the demand for the book require the publication of a second edition at a future time, it should be rectified without fail, seeing what an important place such clubs now occupy in the shipping world. It would be an invidious task, and a lengthy one, to compare the relative merits of

Mr. McArthur's and Mr. Lowndes' books on Marine Insurance; but we may shortly say that there is perhaps more minuteness of detail in Mr. McArthur's. This is especially the case in the chapter on General Average. Mr. McArthur and Mr. Lowndes, while each recognises the actual state of the law in holding that in the event of damage to goods under the protection of a marine policy, the partial loss must be ascertained by a comparison of the gross values of the sound and damaged goods, are at issue as to the soundness of the principle involved; the former contending that the decision of the Court of King's Bench, protecting the underwriter from the uncertainty of a fluctuating market, is in accordance with the principles upon which the contract of indemnity is founded; the latter insisting that the comparison of the net values of the sound and damaged goods, though it would lay the underwriter open to the fluctuation of the markets, would yet result in a more equitable settlement of the loss than that now prescribed by law. When two such practical men are at issue on a point so technical, we are inclined to ask, with Pope, 'Who shall decide, when doctors disagree?' and to be thankful that, so far as the law of England is concerned, the question has been settled for more than eighty years. We cannot accept Mr. McArthur's statement on page 16 as to the retention of the policy by the underwriter pending payment of the premium. We believe that the usual custom is for the assured to prepare the policy (in a case of insurance by an ordinary Lloyd's policy) and to hand it to the underwriters for signature; and that the policy is frequently signed and returned to the assured or his broker long before payment of the premium. We must also note as a drawback that in many places in this book propositions of law are advanced—we do not suggest, incorrectly—without being supported by reference to any legal authority; and that where references are given, they are in many cases incorrect, or taken from obsolete editions of the works cited.

Notwithstanding these defects, Mr. McArthur's book lays before the reader, on the whole, a clear and correct view of the law of Marine Insurance: the style of writing is pleasing and the text is full of interest: the appendix contains much information of value to the practical man of business: and the index is copious, terse, and accurate. Although hardly destined to be of authority as a legal text-book, this volume will doubtless be largely used as a guide by commercial men.

Woodfall's Law of Landlord and Tenant. The thirteenth edition. By J. M. Lely. London: H. Sweet & Sons, W. Maxwell & Son, Stevens & Sons. Large 8vo. lxxxi and 1063 pp.

A thirteenth edition of a well-known book, and by the same editor as the two last, needs no recommendation, and is all but exempt from criticism. We would only suggest, as an interesting metaphysical problem, whether this be really the same book as the original Woodfall, now not even surviving in at least two of the libraries of the Inns of Court: a thing much amiss, for the first edition of a book ought always to be preserved, and also every edition (like Harrison's first of this very book) that amounts to a substantial recasting. A practical suggestion which follows is that, in justice to the editors, the name of Woodfall, if not removed from the title-page, should at least have been shifted to a secondary position, like that of Passow in a certain intermediate stage of Liddell and Scott's Lexicon. Also the superposition of divers prefaces to former editions, consisting mostly of matter inapplicable to the current edition, might well have been dispensed with.

In order to test the present edition somewhere, we have turned to the chapter on 'Rights and Liabilities as between Landlord or Tenant and Third Persons.' Considering the difficulty of many points under this head, we doubt if the chapter is full enough; and a general reference to a paragraph of Story's Equity Jurisprudence is, since the Judicature Acts, a rather summary way of dealing with the remedy by injunction in an English book. In citing *Cooper* v. *Crabtree*, a rather interesting case in the Court of Appeal (1882), the reference to the Law Reports, 20 Ch. D. 589, is not given. We are a little surprised that *Mitchell* v. *Darley Main Colliery Company* has not found a place even in the Addenda. Either Mr. Lely or his immediate predecessor has, to his credit, duly escaped the trap set by the peculiar form in which *Gandy* v. *Jubber*, 5 B. & S. 78, stands in the books. That case was on the point of being reversed in the Exchequer Chamber, but the parties agreed meanwhile (5 B. & S. 485) and the judgment which had been prepared (9 B. & S. 15) was not delivered. We agree with Mr. Lely that the undelivered judgment, supported as it is by the later authorities, may be taken as good law. So far as this sample goes, the merits of the editorial work are substantial and the shortcomings minute; and we have no reason to suppose that the bulk is inferior.

Practical Treatise of the Law of Rating. Second Edition. By Edward James Castle. London: Stevens and Sons. 1886. 8vo. xxviii and 570 pp.

Mr. Castle's treatise on the Law of Rating, a second edition of which was published at the beginning of the present year, is a good specimen of sound and useful work on a not particularly attractive subject. The style is pleasant and the arrangement suitable. In a book of this kind which is seldom perused for improvement a great deal depends upon the index, and Mr. Castle's index seems commendably full. Three very recent cases are reported in the appendix, the reports cited being those of the *Times* newspaper. These reports may be useful to enable future readers of this edition of Mr. Castle's to identify the cases, but it is open to doubt, considering how much we still suffer and how much more we shall suffer from over-reporting, whether any reference to reports which have no authority at all is quite legitimate. The 'Historical Introduction' with which Mr. Castle begins brings down the history of rates and rating authorities and statutes only so far as Sir Anthony Early's case in 1633.

Precedents of Deeds of Arrangement between Debtors and Creditors, with Introductory Chapters. By George Woodford Lawrance. 2nd Edition. London: Stevens and Sons. 1886. 8vo. xviii and 120 pp.

This second edition of a short and useful work will be welcomed by the profession. It will be especially useful in the numerous cases where it is desired to arrange the affairs of a debtor without recourse to the procedure of the Act of 1883. The larger part of the work is devoted to cases of this class, and we feel bound to add that the reader seems scarcely warned sufficiently that a taint of illegality now affects all such arrangements. The author indeed somewhat quaintly tells us that if a deed of arrangement should be overreached by a receiving order within three months the position of the trustee will be 'not pleasant' (op. cit., p. 18); but on the whole he takes a sanguine view of the position of persons acting under private arrangement. In our view, however, the case of *Ex parte Vaughan*, L. R. 14, Q. B. D. 25, which the author cites, is full rather of warning than comfort to trustees of private arrangements.

The question of private *versus* public compositions and arrangements is one full of difficulty and requires definite solution. Insolvents and their advisers for the most part prefer privacy, while the mercantile community is in favour of publicity in all cases. In the meantime such a work as the present will be of much use to the practitioner.

Inventions and how to patent them. A practical guide to patentees. By T. Eustace Smith. London: W. H. Kelly. 1886. Small 8vo. viii and 104 pp.

This book possesses a combination of merits in a small compass. It is at once a practical guide for inventors, and a handy book for the lawyer. The requirements of the inventor are well thought out, and the directions for his guidance simply expressed and well arranged. The salient points of patent law are disencumbered from unnecessary detail, and stated with clearness and precision.

There is, after all, no great mystery about the principles of patent law. They consist of a few common-sense deductions from the constitutional law embodied in the Statute of Monopolies (21 James I. c. 3)—that the Crown has *no power* to grant a monopoly except to the first and true inventor of a new manufacture; and the conditions, made by subsequent legislation, that the invention must be properly specified and disclosed. The difficulties in the application of the principles arise from the multitude of existing industries and their rapid modification by the fertility of inventors. It must be confessed that there is too much tendency in some of the literature on patents, to invest the subject with an air of mystery which is entirely avoided in the book before us.

The work shows some slight signs of haste in final revision. For instance, on p. 55 we are referred to an 'earlier' part of the book for what appears to be contained in Part V, p. 81 *post*. On p. 74, l. 19, 'granters' should be 'grantees.' There is a confused arrangement, which should be altered, in the sentence at the foot of p. 89.

We think that any one who meditates applying for a patent will do well, before seeking further advice, to spend half-a-crown on the purchase of this little book. A careful perusal will give him much valuable information, and may save him expense and disappointment.

The Complete Annual Digest of every reported case in all the Courts for the year 1885. Edited by Alfred Emden. Compiled by Herbert Thompson. London: W. Clowes and Sons. 1886. Large 8vo. xciv and 512 columns.

We have again to acknowledge the receipt of this useful Annual. It is always a satisfaction in practice to be able to turn at once to the latest judicial authority; the more so when we have become used to skip extensively in reading the Law Reports. To test the completeness of the collection before us (which is stated to be made up to the 1st of December, 1885), we turn to the heading 'Husband and Wife—Married Women's Property Acts.' On the question—whether property to which on the 1st of January, 1883, a married woman was entitled in reversion, and which has since fallen into possession, has become separate property under the 5th section of the Act of 1882—we find five conflicting decisions, the balance of authority being for the affirmative. The question came up to the Court of Appeal in *Reid* v. *Reid*, 22nd January, 1886, and was there decided in the negative. The reports seem to have been ransacked for authorities, but none are cited from any report previous to 1st December, 1885, except those which are

collected under the above heading of this Digest. These cases at once illustrate the care with which this collection has been made; and serve as a warning against too implicit a reliance upon this or any other collection of recent authorities.

Manual of Revenue and Collectorate Law. With Annotations by H. A. D. Phillips, Calcutta. Calcutta: Thacker, Spink & Co. 1884. 8vo. vii and 1032 pp.

This book is not at first sight very interesting to English readers. Yet it is worth their while to look at it, if only to see the nature of the work which an Indian 'District' Officer has to perform. There is not a subject connected with the land which he has not to consider. To assess the revenue he must know something of agriculture. Then he has to administer the law relating to roads, drainage, embankments, registration, acquisition for public purposes, and so forth. Besides this, he has to look after the revenue on salt, opium, stamps, and trade licenses. He also takes charge of infants and their estates, and manages sales for arrears of revenue, with a number of other minor duties. This, it must be remembered, is only one side of his duties, for every 'collector' is also a magistrate, and as such administers the criminal law.

The Preface is not very instructive, and it is a little too much to hope from a Manual of this kind that it will 'substitute certainty for uncertainty.' Indeed, it is to be feared that the editor labours under the delusion so common in India that Courts of Law can give decisions which in the space of a few lines can solve any legal difficulty. In the first five pages we come upon a question which no Court and no Legislature has been able as yet satisfactorily to settle—the exact rights of riparian proprietors when the stream shifts its course. But the book will probably be a useful one, as it brings some fifty Acts of the Legislature into a portable form. We recommend it to the attention of the Civil Service Commissioners, and suggest to them to consider whether, during what is called the 'special preparation' of young men for the Indian Civil Service, it might not be as well to examine them in some of these Acts instead of in Sandars' Justinian, or the Contract Act, or the Civil Procedure Code, which are almost entirely useless to them when they arrive in India.

The Elements of Jurisprudence. By Thomas Erskine Holland. Third Edition. Oxford: Clarendon Press. 1886. 8vo. xix and 372 pp.

This book has taken a standing which makes detailed comment on a new edition superfluous. Prof. Holland has remodelled and somewhat developed his exposition of the relation of apparent to real consent in contract. He says that 'here, *more even than elsewhere*, the law looks, not at the will itself, but at the will as voluntarily manifested.' To this, except perhaps the words we have italicized, we cannot object. But to substitute the manifestation for the will itself in the main conception of agreement, as Prof. Holland seems inclined to do, is to disregard the normal and sane aspect of things for abnormal and diseased aspects, or to turn the law of Contract into a law of Estoppel. It is strange that, holding such a view, Prof. Holland should elsewhere adhere to the wrong definition of negligence or *culpa* as 'a state of mind.' Negligence is the opposite of diligence, and diligence is not a state of mind. But it is something that Austin's cumbrous rubbish about negligence, heedlessness, and rashness is relegated to a footnote. In the next edition we trust it may wholly disappear.

The Acts relating to Building Societies, comprising the Act of 1836 and the Building Societies Acts, 1874, 1875, 1877, 1884, and the Treasury Regulations, 1884. By E. A. WURTZBURG. London: Stevens & Sons. 1886. Small 8vo. xii and 270 pp.

THIS is a book about which there is little to say; the most striking matter in regard to it is the way in which it shews how curiously unbusinesslike the Legislature is in dealing with its Statutes. Of all subjects in the world, one would suppose that that of Building Societies required a single clear and intelligible Act to regulate it. But as the heading to this notice shews, Parliament has left the investor in Building Societies to find his way through a number of Acts. The 'copious notes' to which the title page calls our attention are rather small legal treatises than notes, that for example on sect. 1 of 6 and 7 Will. IV. c. 32, extends from p. 15 to p. 37. But so much of the book as consists of Mr. Wurtzburg's work is clearly and sensibly done, though perhaps it is rather diffuse. Thus, in regard to the personal liability of the trustee or secretary, in order to exemplify the statement that if one of these persons wishes to avoid personal liability, he must use explicit words to shew that intention, and that the addition of the words 'trustee or secretary' is not enough, we find three cases cited, and the promissory note in each set out. One of these would have been quite enough, and indeed the statement that the words 'trustee or secretary' are insufficient, really requires no exemplification. Nearly half the book consists of the Treasury Regulations, and Precedents of Rules and Deeds, which will add to the usefulness of the work, as will also the satisfactory index, an essential and most necessary feature of a book such as this.

Dutch Village Communities on the Hudson River. By IRVING ELTING. (In John Hopkins' University Studies.) Baltimore. 1886. 8vo. 68 pp.

THIS is a careful study of local *origines*, which may lead to a controversy between Low-Dutch New York and Anglo-Saxon New England as to priorities in importing self-government and townships. For the general history of institutions it is all one whether the American township was derived by one or another channel from the common Teutonic habit, even as it matters not to the lawyer whether a settled rule of the common law was first laid down in the King's Bench, Common Pleas, or Exchequer. But evidence of the revival of dormant archaisms in a new country is always interesting.

The Governance of England: otherwise called the difference between an absolute and a limited monarchy. By Sir JOHN FORTESCUE, Kt. Edited by CHARLES PLUMMER. Oxford: Clarendon Press. 1885. 8vo. xxiii and 387 pp.

THIS is an excellent specimen of the ways in which a student of history can help students of law on the ground common to both sciences. Mr. Plummer's critical and exegetical apparatus are so fully and carefully ordered that it is needless for us at present to add anything. He has made the earliest treatise on the English Constitution an open book instead of a practically closed one. We shall only cite—not as a fair sample of Fortescue's work—a grotesque bit of mediæval etymology. 'Policia dicitur a *poles*, quod est plures, et *ycos*, scientia.'

The History of the English Constitution. By Dr. Rudolph Gneist. Translated by Philip A. Ashworth. 2 vols. London: William Clowes and Sons, Limited. 1886. 8vo. Vol. I. xvi and 437 pp.; Vol. II. vii and 466 pp.

Mr. Philip Ashworth has done good service to readers of every class by translating Gneist's *Englische Verfassungsgeschichte* into English, for he has enabled everyone to study the works of an author who has seen more clearly into the essential nature of English constitutional history than any writer who has treated of our constitution. Mr. Ashworth has performed his duties as a translator with care and conscientiousness. His one defect is, that, like many Englishmen who have immersed themselves in German literature, he has become Germanized, and uses turns of expression and of thought which would certainly not be natural to any English writer. Anyone will see what we mean who looks at vol. i. p. 111 of the translation; it ends in these words: 'Having advanced in person to the supreme government of the realm, the county and municipal unions comprehend in themselves both feudal and local law, military and municipal constitutions, ruling classes (prelates and nobles), and middle classes (knights and burgesses), all in a living organization.' These sentences contain a meaning, but they require to be done into the vulgar tongue, or rather into the vulgar mode of English thought, before an un-Germanized Englishman can see what that meaning is. It is, however, little short of ingratitude to carp at the defects of a work, the performance of which by Mr. Ashworth is of such signal benefit to the public; and our whole object in the short space at our command is to point out to students unacquainted with Gneist's writings what are the special merits of that author's constitutional treatises.

A critic who wishes to obtain an insight into the characteristics of Gneist's work, can take no better course than to read and re-read Gneist's admirable chapter on the Republic, or, to use our ordinary English expression, the Commonwealth. Such a perusal of what is after all merely one fragment of a monumental work, will show that Gneist's treatment of a perplexing part of our history is marked by three noteworthy features.

First. The basis of Gneist's conclusion is sound and extensive knowledge of English history as a whole. This capacity for looking at the development of institutions in their entirety is a quality in which English writers on the Commonwealth have in general been wanting. It is the lack of the power to take a comprehensive view of historical events which has prevented the laboriousness, the industry, the insight, the imaginative genius of Carlyle from producing an account of Puritanism which can satisfy the judgment of calm enquirers. The general impression left on readers by his *Cromwell* is that for once heroes appeared in the land, that they appeared in an heroic age, did heroic deeds, and failed so completely of achieving any permanent good for their country, that the nation was, after years of heroic government, prepared to welcome back with acclamations the most worthless and the meanest of the Stuarts. Gneist, on the other hand, not by means of rhetoric but by the force of mere facts, shows both the greatness of the Puritans and the reason why Puritanism missed its mark. Paradoxical as the conclusion sounds, Charles I and Cromwell each failed for the same reason: they neither of them could establish that combination of vigorous government and

respect for law which England desired, and which, after efforts lasting throughout more than a century, she attained.

Secondly. Gneist shows precisely what were the forces which were too strong both for the royal and stupid despotism of Charles, and for the democratic and intelligent despotism of Cromwell. The organization of English society was in the seventeenth century, perhaps even more than at present, based on the government of the country by the leaders of the most influential classes, subject to the supremacy of the law enforced in the last resort by judges who, though they represented the power of the Crown, thoroughly sympathised with the feelings and habits of the nation. The administrative machinery in Church and State was essentially national; any government, which, like that of Charles or of the Protector, rested on the support of a minority, necessarily found—as Gneist makes perfectly clear—either that the persons through whom the administration must be carried on, such as Judges, Lord-Lieutenants, or Magistrates, would not carry out the policy of the executive, or that the executive must rely upon the support of a standing army, that is become avowedly despotic. The Protector's failure to found a permanent Commonwealth depended upon no accident; it could have been avoided (if at all) only by his becoming King, that is taking up a position recognised by the law and compatible with respect for law. 'A king of England,' says Thurloe, 'can only succeed to a limited prerogative, and must govern according to the known laws. A protector, although with less nominal authority, has all that the sword can give him.' Cromwell's refusal of the Crown doomed his policy to failure. Whether the error was due to want of statesmanship, or to want of audacity, must remain an open question. But students of Gneist's book will not doubt it was an error, though possibly an inevitable error.

Thirdly. The reason why Gneist is able to throw so much light, not only on one very perplexed period of English history, but on the whole development of our national institutions, is not either entirely or chiefly his intimate knowledge of English constitutional history, though his knowledge is very great. The secret of his strength is that he, beyond any other writer we know of, takes into account the immense influence of English law, or, to put the same thing in other words, grasps more fully than other constitutionalists the fact that the law of England has given expression to and has in turn re-acted upon the national character of Englishmen. This is a little concealed by his rather singular use of the word 'self-government.' It does not with Gneist, as it generally does with writers like De Tocqueville, mean the authority of local bodies as opposed to the authority of the central executive. Our author is fully aware that the local administration of England is by no means the strong point of the constitution. The term 'self-government' in his mouth means the government of the nation according to the laws which express the will and spirit of the nation. This kind of 'self-government' is, as Gneist again and again points out, consistent with the existence of a strong central executive. The more students imbibe the spirit of his work, the more clearly they will perceive that the supremacy of the law of the land is of the essence of the English Constitution, and that this supremacy of the law originates in the early and undisputed authority of the Crown. The power of the king has been in a sense the cause of the freedom of the nation. This is one of those apparent paradoxes which embody an indisputable truth, and this truth has been made apparent by Gneist because he has studied history as a lawyer.

The System of Legal Procedure in England, with Swedish parallels [we translate the title]. By G. Fahlcranz, juris utriusque candidatus, Deputy District Judge. Stockholm: Loostrom & Co. 1885.

The Legal Reform Committee of the Incorporated Law Society for Ireland report, as the result of their investigations into procedure, that in Sweden 'there is no bar nor any corresponding body of trained lawyers, nor any body of men corresponding to solicitors. Any man may plead his case before the Courts in person, or he may employ anybody else he pleases to conduct his case for him. Some of the men who are so employed are men who have passed legal examinations at the universities; but among those who plead in Court are persons who have failed in other professions .... There is no body to regulate the affairs of the legal profession in Sweden.' In this state of things, foreign plaintiffs, whom an evil fate has driven to venture upon the stormy sea of Swedish litigation, will be neither surprised nor sorry that an honourable and high-spirited Swedish gentleman has felt it his duty to urge upon his countrymen the necessity of reforming their legal procedure. Without in the least impeaching their personal integrity, Mr. Fahlcranz narrates various incidents from his own experience when an advocate which certainly indicate a low tone of business morality among the heterogeneous body of amateurs who undertake the conduct of litigation in Sweden. Finding all attempts to arouse the conscience of others on this point met only with the confident assurance that 'French and English advocates were, in this very respect of guile and chicanery, proficients compared with whom the trickiest Swedish jurist would never be more than a mere bungler,' Mr. Fahlcranz made careful enquiries on the spot as to the rules of practice and the standard of professional morality prevailing in Christiania, Hamburg, Paris, and London. The conclusion at which he arrives is, that conduct 'which Norwegian, German, French, and English advocates unanimously and unhesitatingly condemn as unworthy, dishonourable and deserving of punishment is considered by the most respectable Swedish jurists to be just and right, or at any rate business-like and unexceptionable.'

Mr. Fahlcranz has given special attention to English practice, having spent altogether more than a year in studying the procedure of the London Courts. We may take a legitimate pride in the fact that he was led to adopt this course, and to publish so elaborate a study of English procedure as the best means of promoting a higher tone to the practice of law in his own country, by 'the impression derived from a variety of circumstances that in England litigation is freer than in any other country from those particular faults under which it labours in Sweden.' But gratifying as Mr. Fahlcranz's testimony is, the surprise with which he welcomes some quite ordinary instances of honourable feeling or legal efficiency tends rather to the condemnation of Swedish than to any very high encomium on English justice. That railway officials should dispense with the daily production of a season-ticket, or that a Court should telegraph off an injunction upon the scarcely coherent application of a distressed plaintiff in person, are in themselves no great achievements of civilization, nor necessarily incompatible with the existence of grave injustice; but it would apparently be chimerical to look for anything of the sort in Sweden. Yet Mr. Fahlcranz is probably quite right in attributing the superior manifestation of just feeling in English life not so much to any inferior personal integrity of his countrymen as to their thoroughly vicious and arbitrary system of administering the law.

The body of the work consists of an account of the powers and limits of

our Courts, the jury-system, the leading features of pleading, of the rules of evidence, of trial in open Court, of Chamber business, of Appeal and County Court Procedure, &c. Then follow essays on the characteristics of the English system specially striking to a Swede, such as the uniformity secured to our jurisprudence by the fact that a comparatively small number of judges of the Queen's Bench Division go circuit over the whole kingdom, and that the growth of discrepant traditions of justice is firmly held in check by the concentration of all the Superior Courts in London. The plan of illustrating a question by exhibits seems to be another of the little moralities which are unknown in Sweden, for Mr. Fahlcranz was so much impressed with its obvious advantages that he has inserted a picture of the trial of *Belt* v. *Lawes* (in which, in truth, the practice was monstrously abused) as a frontispiece. The absence of a Code, the division of functions between the two legal professions, and the jury-system are also further treated of, and the book concludes with a few verbatim extracts from some recent cases. Great pains have evidently been taken to insure accuracy—indeed we have detected nothing worse than the common but unauthorized phrase 'Statement of Defence.' The preface makes very handsome acknowledgment of friendly assistance received by the author from many English lawyers—above all, from Lord Justice Lindley, to whom, in common with the Swedish minister in London, the book is dedicated.

A History of Taxation and Taxes in England from the earliest times to the present day. By Stephen Dowell, Assistant Solicitor of Inland Revenue. 4 vols. London: Longmans, Green & Co. 1884. 8vo. Vol. I. xvii and 297 pp.; Vol. II. xx and 449 pp.; Vol. III. xviii and 379 pp.; Vol. IV. xviii and 476 pp.

Mr. Dowell's elaborate *History of Taxation and Taxes* is not exactly light or easy reading, and a critic may predict with some confidence that Mr. Dowell's work will never obtain wide popularity among general readers. But it is a book which serious historians will, we suspect, find they cannot without great loss neglect. The history of economics is not a lively or fascinating, but it is a most instructive study; and whoever looks into Mr. Dowell's pages will soon convince himself that the annals of taxation, lying, as they do, just on the borderland between the spheres of law and the spheres of history, have been far too much neglected by philosophic enquirers into the causes of national progress, and further that the prosperity of England has a very close connection with our system of taxation. Here, as elsewhere, the astounding acuteness of Montesquieu has seized at a glance a feature of English institutions to which very insufficient prominence is given by professed historians. The 19th and 20th chapters of the 13th book of his *Esprit des Lois* comment upon the advantages of the system by which the State itself levies its taxes for its own advantage (*la régie*) compared with the disastrous results of farming the taxes, and no reader can doubt that Montesquieu has in his mind the distinction between the habitual system of England, and what in his time was the system invariably pursued in France. It is hardly an exaggeration to say that farming the taxes was the ruin of French finance, and that the non-existence in England of the class of farmers-general was the source of our financial prosperity. But an investigation into the causes why the English methods of taxation were in the main different from and far less oppressive than those of the Continent, leads one into enquiries and speculations which touch the very roots of our institutions. In other words, writings like those of Mr. Dowell's deal with

a matter of primary historical importance. He too, like Gneist, sheds, unconsciously it may be, curious light on the Puritan revolution, and on one cause of the lasting unpopularity of Puritanism. Our modern system of taxation dates from the Commonwealth. Good government, and especially good government which involves the maintenance of a large standing army, meant in the seventeenth century in England, as it does in the nineteenth century in Italy, dear government, and dear government means heavy taxes. We cannot but suspect that the success of the Commonwealth in raising a large revenue, had a good deal to do with the failure of the Puritans to enlist popular sympathy. This is a matter on which Mr. Dowell has nothing to say. He has conscientiously, perhaps too conscientiously for his popular reputation, kept to his proper subject. His sole aim is to give us an account of the history and growth of taxes; he does not concern himself with the historical inferences which his statements suggest. But this does not make them a whit the less full of suggestiveness and instruction.

A Guide to the Income Tax Acts: for the use of the English Income Tax Payer. By Arthur M. Ellis. Second Edition. London: Stevens & Sons. 1886. 8vo. xvi and 291 pp.

Is it possible to write a popular work on the income tax? We doubt it. The income tax statutes, together with the judicial decisions upon their construction, make up a whole branch of the law of revenue; they are crabbedly drawn, one may doubt whether they ever were very intelligible, or even were meant to be intelligible (for Pitt may have wished to conceal the imposition of a new land-tax), and the course of time has added to their intricacy, for the growth and the complicated conditions of modern trade have created forms of property which hardly existed in 1799 or even in 1842, when Peel's Income Tax Act, 5 & 6 Vict. c. 35, came into force. Hence the necessity for supplementary legislation and for explanatory judgments. An author, therefore, who attempts to treat in a popular manner of the Income Tax Acts, is placed in this dilemma. If he makes a statement of the law which does not keep to the very words of the Statutes, he is all but certain to mislead; if he clings to the *ipsissima verba* of the Acts, he is hopelessly obscure. He is driven, from the necessity of the case, to be either a false guide or no guide. Whether Mr. Ellis has been able to escape from the horns of this dilemma remains to our minds, after glancing at his book, to say the least, an open question. In treating, for instance, of cases, such as *Last* v. *The London Assurance Corporation*, 12 Q. B. D. 389, he has given, and probably this is the best he could do, a lengthy abstract of the case. But whether the abstract is a whit more intelligible to the ordinary reader (who we suspect will generally be a solicitor) than the report of the decision contained in the Law Reports, is not clear. The sale of Mr. Ellis's book, which has rapidly attained a second edition, is proof that some such work was wanted, and affords some evidence that Mr. Ellis has satisfied the want.

The Law of Distress. By A. Oldham and A. La Trobe Foster. London: Stevens & Sons. 1886. 8vo. lii and 484 pp.

There has for some time been an opening for a special treatise on the Law of Distress, the exemptions successively introduced by the Lodger's Goods Protection Act, 1871, the Railway Rolling Stock Protection Act, 1872, and the Agricultural Holdings Act, 1883, having greatly increased

the difficulties of an always difficult subject. In the work before us the authors have strung together the statutes and cases smoothly enough, including, very happily, the Law of Distress for rates and penalties, as amended by the Summary Jurisdiction Act, 1879. Independent criticism, however, is sadly lacking; for instance, both *Walsh* v. *Lonsdale*, 21 Ch. D. 9, in which the Court of Appeal said very new things about the effect of an agreement for a lease, and *Ex parte Harris*, 16 Q. B. D. 130, in which the same Court put a rather strange construction upon the Lodger's Goods Protection Act, are passed over as if they had been the most natural decisions in the world. Nor do we find any original suggestions to guide the practitioner in the cases where 'the books' are silent; as for example on the question whether 'double costs,' or rather the indemnity substituted for them by 5 & 6 Vict. c. 97, s. 2, can still be recovered as of right; or whether the curious repeal of 17 Car. 2, c. 7, s. 4 (allowing second distress) by the Statute Law Revision Act of 1881, has any effect. Speaking generally, we find the case law to be accurately and fully stated, except that, in a book of so narrow a range, we think we may justly complain of the absence of *In re Saunders*, 54 L. J., Q. B. (Bank) 331, and of *Clarke* v. *Milbank Dock Co.*, 53 L. T. 316, notwithstanding the recent date of those cases.

There is a very good set of forms, the index is quite up to the mark, and we are glad to observe that references are supplied to all the reports in which a case may be found.

Car Trust Securities. By Francis Rawle. Philadelphia: Dando & Co. 1885. 48 pp.

This is a branch of law upon which there has been extensive litigation of late years in the United States. Mr. Rawle has collected, reviewed and analysed the numerous decisions in the Courts of the various States, but concludes with the remark that in none of them 'is to be found anything like full discussion of the new questions that have arisen.' Car Trust Securities are we believe unknown on this side of the Atlantic, and the Railway Companies Act 1867, by providing that railway rolling stock shall not be taken in execution, would render them nugatory; but in the United States, as many English investors know to their cost, it is very common for the 'road' to be pledged to one set of creditors, and the rolling stock to another. There appear from Mr. Rawle's account to be no less than six different modes of borrowing upon railway rolling stock, the creditors being usually a 'Car Trust Association,' represented by a trustee. The cases are carefully marshalled and acutely discussed, and the 'few words as to the commercial aspect of car trust securities' are by no means out of place.

Étude sur le titre 'De migrantibus' de la loi salique. Par Fustel de Coulanges. Paris: Ernest Thorin. 1886. 8vo. 36 pp. [From the *Revue générale du droit.*]

Every one who has studied this text from Pardessus to Sohm has gone astray. The *migrans* ('si quis super alterum in villa migrare voluerit') is not a would-be purchaser, but a squatter. The procedure laid down for the 'vel unus vel aliquis ex ipsis [qui in villa consistunt] qui contradicat' to obtain the ejectment of such a squatter is so formal and dilatory as to be rather favourable to him than not. There is nothing to show that the right given to any inhabitant to object to the settlement of a new-

comer has anything to do with the constitution, historic or pre-historic, of a free village community. Such are the points made by M. Fustel de Coulanges in this brilliantly paradoxical dissertation, which has reached us too late to receive more than a very brief notice. It is always possible to frame ingenious exercises in destructive criticism when direct evidence is scanty, and the ingenuity here shown is great. But the fact remains that any one inhabitant of the *villa* (whatever that may precisely mean) can take steps to get rid of a *migrans* at any time within twelve months of his migration (whether that means a settlement under colour of right or a mere squatting, or includes both): and M. Fustel de Coulanges, while he rejects the current explanation of that fact, has none of his own to offer. He can hardly be serious in inferring a purpose to favour the defendant from the repeated summonses and taking witness of the Salic procedure: at least we have not yet heard that the customary law of Iceland, some centuries later, deliberately favoured manslaughter. And he passes deftly and lightly over the substantial fine imposed on the contumacious *migrans*—as much as is laid down in an earlier chapter for breaking a man's skull. We wonder what M. Fustel de Coulanges would make of the early English documents. Probably he would show that everything we have learnt from Allen and Kemble is pure and simple *Erdichtung*. If he ever comes that way we may peradventure break a lance with him. For the present we have no mind to spoil sport by further interference in a quarrel which belongs to the Germans, and first among them to Sohm. But if we might offer a counsel to M. Fustel de Coulanges for his conduct of the impending duel, it would be to lay to heart in a spiritual sense the words of Cordelois, a wise and authoritative master: 'J'engage à être très-sobre des *temps*.'

The Student's Practice of the Courts: being a Practical Exposition of the Proceedings in the Queen's Bench, Chancery, Probate, Divorce and Admiralty Divisions of the High Court, the Court of Appeal, and the House of Lords. By Albert Gibson and Robert M'Lean. Third Edition. London: Reeves & Turner. 1885. Large 8vo. xliv and 448 pp.

This is the third edition of a book well known to legal students. As an educational treatise it is of great merit, but the claim rather faintly put forth in the preface that it is a valuable work of practice also, cannot, we think, be entirely justified. The text-books of legal principles which are adapted for the use both of the student and the practitioner are few in number, while books of practice seem almost necessarily to be either too minute for the general benefit of learners, or too general for the use of actual practitioners; and to the rule thus indicated, the present volume seems to us to form no exception. It is, however, well designed for its primary purpose of instructing students.

NOTES.

Conditional Fees in Bracton.—Several of the most accepted text-writers agree in stating that before the Statute *De Donis Conditionalibus* in 1285, the donee of an estate granted to him and the heirs of his body, which they call a conditional fee, or a gift of the fee conditional on the donee's having heirs of his body, had not the fee and could not aliene, till he had heirs who satisfied the description in the grant, and that then his previous freehold for life became an estate on fee and he could alienate in fee.

Thus Mr. Digby says, commenting on Bracton[1]: a gift '*Viro et haeredibus suis de corpore procreatis*, was held to imply a condition, and to be the gift of the fee conditional on the donee having issue of his body.' And again[2], 'in Bracton's time, a gift .... to a man and the heirs of his body, ... was held to be an estate of inheritance conditional on issue being born; until this event happened the interest was in effect merely an estate for life. .... So soon as the condition was performed by the birth of issue, the tenant could alienate and convey an estate on fee simple.' Mr. Pollock says[3], referring to 'Bracton's exposition,' 'by grant to *R.* and the heirs of his body .... *R.* could not alienate till some one capable of succeeding under the special designation was in existence. .... His interest was called .... an estate in fee simple conditional, as it fell short of being a complete fee simple until the condition of an heir of the named class being in existence was fulfilled. .... But if, having issue answering the description, *R.* made a grant in fee simple to *M.* .... in *M.*'s hands the estate would be a common estate in fee simple. .... Thus if *R.*'s lineal descendants, ... ceased to exist, this would not enable the lord or his heirs to claim the estate by escheat[4].' Mr. Joshua Williams explains the grant differently[5]; he describes a grant to *A.* and the heirs of his body as a *conditional gift*, 'by reason of the condition implied in the donation that if the donee died without such particular heirs, or in case of the failure of such heirs at any future time, the land should revert to the donor,' and assigns the change in the law allowing the tenant on such a conditional gift to aliene in fee simple as against the lord, as soon as he had an heir of the class limited in the grant, to the reign of Edward I.

The Statute *De Donis* hardly supports in full the explanation of Messrs. Pollock and Digby. It recites 'de tenementis quae multotiens dantur sub conditione[6], videlicet, cum aliquis dat terram suam alicui viro et ejus uxori et haeredibus de ipsis viro et muliere procreatis, adjecta conditione expressa[7] tali, quod si hujusmodi vir et mulier sine haerede de ipsis .... procreato obiissent, terra sic data ad donatorem vel ad ejus haeredem revertatur[8]: .... praeterea cum deficiente exitu de hujusmodi feoffatis, tenementum sic datum ad donatorem vel ad ejus haeredem reverti debuit per formam in carta de dono expressam, licet exitus, si quis fuerit, obisset, per

[1] History of Law of Real Property, 2nd ed., p. 145, note 1. [2] p. 187.
[3] Land Laws, pp. 63, 64.
[4] Goodeve (p. 64) takes a similar view. [5] 12th ed., p. 37.
[6] In Bracton's view this would be a *donatio sub modo*, the condition acting as a divestitive, not an investitive, fact, *vide infra*.
[7] In Bracton's work this condition may be 'tacita:' in 1303 it was clearly stated that it must be expressed: '*En fourmede doun taile la reversioun nest pas sauve, si la reversioun ne seit expresement sauve en la chartre.*'
[8] Y. B. 31 Edw. I, p. 385, Rolls Edition.

factum et feoffamentum ipsorum, quibus tenementum sic fuit datum sub conditione, exclusi fuerunt hucusque de reversione eorundem tenementorum[1], quod manifeste fuit contra formam doni sui.'

On turning to Bracton we find that his treatment of the subject, though contradictory, is neither in accord with the Statute *De Donis*, nor with the accounts given of it by Mr. Digby and Mr. Pollock.

A grant 'to *A.* and the heirs of his body,' is not necessarily, according to Bracton, a conditional grant at all, but a *donatio per modum*, and he carefully distinguishes the results of a *donatio conditionalis* and a *donatio per modum*. A condition may be, according to Bracton, but is not necessarily involved in such a *donatio per modum*, and the condition is not the one stated by Digby and Pollock, a condition of birth of issue, but a condition of reversion to the lord on the failure of heirs, as stated by Williams. And, according to one passage, the effect of a grant, to *A.* and the heirs of his body, is to give the donee at once not only a freehold, but a fee, without waiting for the birth of issue.

Bracton in a passage showing traces of Roman influence, divides Donations as follows[2]:—

1. *Donatio simplex et pura* .... ubi nulla est adjecta conditio nec modus; e. g. Do tali et haeredibus suis.

2. *Donatio sub modo* .... item haeredes coarctari poterunt per modum donationis .... ut si dicatur 'Do tali et haeredibus suis, quos de carne sua procreatos habuerit;' in which case the descent is to heirs of this limited class, and if there are none, or they fail, the land will revert to the donor by a tacit or express condition.

3. *Donatio conditionalis*, quae pluribus est adjectis conditionibus, ... e. g. Do tali et haeredibus suis, ... si haeredes habuerit de corpore suo procreatos. Here the birth of issue is the condition, but when it happens the estate descends to heirs generally, and not to the heirs of the body.

The different effects which follow from such a *donatio sub modo*, and *donatio conditionalis*, are stated by Bracton in a remarkable passage later on in the book. He says[3]: 'Si dicat, "Do tali et haeredibus suis, si haeredes habuerit de corpore suo[4]," .... statim erit liberum tenementum donatorii [i. e. a freehold, but an estate for life only], sed nunquam feodum, nisi cum tales (haeredes) habuerit, propter conditionem. .... Si autem sic dicatur, "Do tali et haeredibus suis de corpore suo procreatis"[5] .... *statim erit perfecta donatio, et feodum donatorio*, licet in fine addatur talis condicio, quod si tales non extiterint, vel si extiterint et defecerint, quod terra revertatur ad donatorem, nihilominus perfecta erit donatio ab initio, facta traditione, sed resolvitur sub tali conditione, quae quidem tacita esse possit, sicut expressa, et de necessitate revertitur res data ad donatorem propter defectum haeredum, cum non extiterint vel si extiterint et defecerint.'

Bracton's explanation of a grant to *A.* and the heirs of his body in this passage, as distinguished from a conditional grant, is in opposition to the Statute *De Donis*, and also, in its statement that the grantee obtains the fee without waiting for the birth of an heir of his body, though it is a fee which may be destroyed by failure of issue, to the text-writers cited. But, curiously enough, it is also contrary to another passage in his own work[6]. When speaking of a grant to *A.* and the heirs of his body, he says, 'Sed .... ubi nullus (haeres) extiterit, semper erit res data donatorio liberum tenementum (i. e. an estate for life) et non feodum. Item .... quousque in-

[1] This was not so *temp.* Bracton.
[2] F. 47.
[3] Ff. 17. 17 b. 18.
[4] Bracton's 'Donatio conditionalis.'
[5] Bracton's 'Donatio sub modo.'
[6] F. 17 b.

ceperint haeredes esse, est liberum tenementum, cum autem inceperint habere (haeredes), incipit liberum tenementum esse feodum, et cum (haeredes) desierint esse, desinit esse feodum, et iterum incipit esse liberum tenementum.' It is to be noted of this passage that it would be partly in accord with the passage previously cited[1], if it were applied to the *donatio conditionalis*, '*A.* and his heirs, if he shall have heirs of his body:' but that it directly contradicts it if applied to the *donatio sub modo*, '*A. and the heirs of his body.*'

Whether this passage is in its proper place in Bracton's work, or whether it is either a later gloss, containing the view which undoubtedly prevailed at or after the Statute *De Donis*, or, though less probably, a passage applicable to the 'conditional gift,' quoted on fol. 18, can only be decided by a careful study of the manuscripts. The passage on fol. 47 does not seem to be a later gloss, as it is directly contrary to later law; it falls in naturally with its context, and is probably a genuine piece of Bracton's work.

If this is so, either the law had materially changed between Bracton and the Statute *De Donis*, or Bracton's statements are unwarrantable perversions of the existing law. It may perhaps be doubted whether the odd grant '*A.* and his heirs, if he shall have heirs of his body,' ever had any existence except as an illustration of 'conditions' in a donation, the notion of which Bracton had taken from the Roman Law. I do not think, however, that enough attention has been paid to these peculiarities of Bracton's exposition, which certainly have not made their mark on the modern authorities on the period.—T. E. S.

A correspondent writes thus:—In the middle of an Oxford MS. of Bracton (Rawlinson, C. 160) Sir Travers Twiss found a discourse on consanguinity and affinity which he supposed to be Bracton's work, but did not print. In the Number of this REVIEW for April, 1885, Professor Vinogradoff gave an extract from it and argued that it was the production of some canonist. A MS. at the British Museum (Harleian, 653) introduces at the very same place in Bracton's text a similar, but still different, dissertation, or rather two different dissertations. First there are brief instructions for drawing the tree of consanguinity, and on these there follows what announces itself as the work of Johannes de Deo, a canonist of the thirteenth century, who seems to have been born in Spain but to have written at Bologna. His treatise consists of certain rhyming verses, exceeding bad, with prose commentary thereon. Another discourse on the same topic, very like the Oxford discourse, but not the same, is found in a Cambridge MS. (Dd. vii. 6, a splendid volume containing a whole library of statutes, text-books, writs and so forth, probably compiled very early in the fourteenth century); this, however, is not interpolated into Bracton's text, but precedes it. The history of the Canon Law is perhaps of no great interest to your readers, so I will but give a few lines from these treatises which may be sufficient to show to any learned canonists what they are.

The interpolated matter in the Harleian MS. of Bracton begins thus:—

Quibus modis arbor consanguinitatis debet fieri. In medio videlicet arboris fiat quedam cellula que truncus vel protheus appellatur. Protende ergo a vertice prothei siue trunci sursum lineam ascendentem continentem quatuor cellulas in quarum prima pater et mater ponuntur in secunda auus et auia . . . . . .

[1] It would not be completely in accord, as though the birth of an heir of the body in such a case vested the fee, subsequent death of such heir of the body did not divest it, the descent being to the heirs generally.

Johannes de Deo introduces himself thus :—

Ad honorem summe et indiuidue Trinitatis . . . . incipit commentus arboris de consanguinitate et affinitate . . . . a Magistro Johanne de Deo sacerdote Yspano per xviii. regulas declaratus . . . . Principio nostro sit presens Virgo Maria. Cum circa computacionem arboris diuersi diuersa sensissent quia quot sunt capita tot sentencie . . . . ego Magister Johannes de Deo sacerdos Yspanus . . . . . .

The Cambridge treatise has this for its beginning :—

Ad arborem consanguinitatis docendam et intelligendam primo videamus quid sit consanguinitas. Et est consanguinitas secundum peritos doctores vinculum personarum ab eodem stipite descendentium carnali propagacione contractum. Stipes vero est communis multarum personarum parens.

Just at the end of the discussion of consanguinity an opinion is ascribed to Gaufridus de Crana Cardinalis, that is, Cardinal Goffredus de Trano, a famous canonist, and a pupil of Azo; he died, according to Schulte, in 1245. Then the subject of affinity is taken up :—

Ad intelligendam et dicendam [sic] figuram affinitatis primo videndum est, quid sit affinitas, et est secundum peritos quedam propinquitas personarum, ex carnali copula proueniens omni carens parentela.

Both the Oxford and the Cambridge treatises resemble that of Johannes Andreae; but the three works are not the same.

Our correspondent adds that should any scholar at a distance wish for further information about these MSS. he will be happy to supply it. A letter sent to the Editor will reach him.

In the year 1884 an Act was passed regulating the Yorkshire registries, and in the same year a bill was introduced but not carried affecting the Middlesex registry, and extending its operation to the City of London. It may therefore be not amiss to call attention to one side of the working of these registries, which is probably but little known to those who frame our laws. The account given below is the result of a sham search made by the writer in the Middlesex Registry, for which he paid half-a-crown. There is no difficulty in registering a document, but it is a very difficult matter for the person making the search to find the record of it. For many years the entries were made under the initial letter only, without any attempt at a lexicographical arrangement, but they are now kept in a strictly lexicographical order, and are very well brought up to date, so that the inconvenience of the old arrangement is one which time will reduce to a minimum, by rendering the earlier books of entries obsolete. But supposing the investigation of title to extend only over years in which the entries have been made in the improved manner, even so the search is sometimes most laborious. Where there are two or three common names running through the title, such as Brown, Jones, Robinson, Richardson, Clark, Clarke, Clerk, Smith, Smyth, Smythe, and of course the commonest names are those most frequently searched, the wearisomeness of looking through the lists is simply intolerable. The solicitor sends a clerk to the office to make the searches. The fee is paid, and the clerk goes into a little room round the walls of which the books containing the entries are arranged: there are many other clerks there, and he can scarcely find room on the desk to place the book in which he commences his search. It is all very well for a short time, while the faculties are fresh, but before long the endless recurrence of the same name in book after book must bring about a sort of half-conscious mesmerised condition in the searcher, in which the eye mechanically runs lengthwise down the pages, while the brain, getting more and more behind, follows on as best it can. He

may notice an entry affecting the lands in question, but he cannot be expected to do so with certainty. Probably the most intelligent clerks make the worst searchers, as getting more impatient over the mechanical drudgery than those of a more sluggish disposition. There are about nine pages, each containing forty-three entries for every half-year for the name of Smith, four like pages for every half year for the name of Clark. Where therefore it is desired to find out whether a Mr. Smith or a Mr. Clark dealt in any way with the land which he proposes to sell, it is necessary, supposing he acquired it twenty years ago, to look through 15,480 records of dealings by Smiths or 6880 by Clarks, to see whether the Smith or Clark in question can be found among them. And of course the more land has been dealt with the more names occur in the abstract of title and the more searches have to be made. Again names are occasionally misspelt: 'Smyth in the said indenture by mistake called Smith,' is not unfrequently seen in deeds. There are many people who, having with difficulty learnt to sign their names are by no means particular as to how their names are spelt, and like Mr. Weller senior are quite content to put it down in the way most convenient at the time; or perhaps, having succeeded in reaching a higher round in the social ladder, they have discovered a more aristocratic manner of spelling their name; or the entry may have been incorrectly made in the office. In order therefore that a search should be satisfactory it ought to be carried out through all the possible forms in which the given name can be spelt or misspelt, and a title which contains several common names capable of being written in different ways, is in a register County a less satisfactory title, and one more dangerous to accept, than a title in which rare and unusual names only occur.

HUGH M. HUMPHRY.

In *Norrington* v. *Wright*, reported in the Supreme Court (U. S.) Reporter for Nov. 16, 1885 (vol. vi. part 1. p. 12), and now in 115 U. S. 188 (and see *Filley* v. *Pope*, ib. 213), the action was for damages for non-acceptance of goods. The contract, made in Philadelphia, was (according to the construction rightly put on it by the Court) for 5000 tons of iron rails, for shipment from a European port or ports at the rate of about 1000 tons per month during the five months February to June, inclusive, the balance, if any, to be delivered in July, at $45 per ton; sellers to notify buyers of shipments with vessels' names, as soon as known by them.

The only shipments duly notified by the plaintiffs were—in February 400 tons, March 885, April 1571, May 850, June 1000, July 300—in all 5006 tons. The defendant received and paid for the February shipment, but before receiving any more, learnt for the first time the amounts of the first three shipments, and at once refused to accept the March and April or any other shipments whatever under the contract.

On these facts the defendant recovered a verdict. The plaintiffs were obviously not in a position to prove readiness and willingness to perform their part of the contract (except as to the June shipment), and on the argument of the case in the Court of Error the verdict might well have been sustained on this ground. But the Court determined it on the question of the defendant's right to rescind the whole contract upon his receiving notice of the plaintiffs' breaches in respect of the first three shipments, and decided in the defendant's favour.

The reasons of the judgment are not very satisfactory. The Court, proceeding on English cases, held that *Bowes* v. *Shand* (2 App. Ca. 455), had affirmed the principle of *Hoare* v. *Rennie* (5 H. & N. 19, and 29 L. J., Ex. 7), and *Coddington* v. *Paleologo* (L. R., 2 Ex. 193), as opposed to *Simpson* v.

Crippin (L. R., 8 Q. B. 14) and *Brandt* v. *Lawrence* (1 Q. B. D. 344), and had been followed in *Reuter* v. *Sala* (4 C. P. D. 239) and *Honck* v. *Muller* (7 Q. B. D. 92). We submit, however, that the cases of *Bowes* v. *Shand*, *Coddington* v. *Paleologo*, and *Reuter* v. *Sala* are not in point on the question whether failure to complete one or more of a series of deliveries defined as to amount and time is a ground for rescinding the entire contract. The remaining cases present on that question a curious conflict of judicial opinion.

Hoare v. *Rennie* (1859), which has been much questioned and discussed (see *Simpson* v. *Crippin*, *Honck* v. *Muller*, and *Mersey S. & I. Co.* v. *Naylor*, 9 App. Ca. 434), is undoubtedly a puzzling case. We are convinced, however, that the true key to it must be somewhat as follows: that the plaintiffs never tendered before action any iron except the twenty-one tons mentioned in the pleas (see in confirmation of this the plaintiffs' description of their tender in their second count); that they were, therefore, not in a position to make any claim in respect of the subsequent deliveries, which were clearly severable from the first, and that their real claim was confined to damages for non-acceptance of that which they had tendered as a first delivery. The whole of the arguments of the counsel on both sides, and of all the judges, if carefully examined, clearly imply this: see especially per Pollock C. B., p. 76–7 of the L. J. Report ('They say .... sent and tendered'). It is difficult to see, as the question arose upon demurrer, how upon the pleadings as they stand, the question could have been thus narrowed by admissions of counsel; and we have come to the conclusion that it must have been done by means of particulars given by the plaintiffs of their large demand (see L. J. Report) for damages, by which doubtless they confined their claim to the non-acceptance of the twenty-one tons,—the importance of all which the reporter failed to see! *Hinc illae lacrimae!* Thus considered, the case is obviously *in pari materia* with *Bowes* v. *Shand*, and has no bearing on the next case, *Simpson* v. *Crippin* (1872), which is the leading case, and we venture to think a sound decision, against the right to rescind.

In *Brandt* v. *Lawrence* (1876) the question arose on very different facts, as the contract only permitted the goods to be shipped for convenience in different steamers, but did not stipulate for a series of deliveries defined in amounts and times. It seems, therefore, if *Simpson* v. *Crippin* be right, very difficult to support this decision, especially since the case of *Reuter* v. *Sala* (4 C. P. D. 239), unless indeed on the grounds there suggested, at p. 245, by Thesiger L. J. The last case, *Honck* v. *Muller* (1881), contains considered opinions of Bramwell and Baggallay LL. J. in favour of, and Brett L. J. against, the supposed principle of *Hoare* v. *Rennie;* but as they were not necessary to the decision of the case, it cannot be considered that the authority of *Simpson* v. *Crippin* was, strictly speaking, overruled.

The state of the law, therefore, seems to be as follows:—*Simpson* v. *Crippin*, decided by Blackburn, Mellor, and Lush JJ. and approved by the present Master of the Rolls (*Honck* v. *Muller*, p. 105), is still law; the three former judges questioning, and the M. R. disapproving of the decision of *Hoare* v. *Rennie*. On the other hand Lord Bramwell (in the *Mersey Steel & Iron Co.* v. *Naylor, Benzon & Co.*, 9 App. Ca. at p. 447, and *Honck* v. *Muller*, pp. 100–102), and in the latter case Baggallay L.J. also, approve and seek to distinguish *Hoare* v. *Rennie*, and (*Honck* v. *Muller*) expressly impugn the principle on which *Simpson* v. *Crippin* was decided.

The judgment of the Supreme Court delivered by Gray J. in *Norrington* v. *Wright* has preferred to follow the opinion of Lord Bramwell and

Baggallay L. J. To us, however, it seems that *Simpson* v. *Crippin* is the sounder mode of applying to this class of cases the general principle stated by Lord Coleridge C. J. in *Freeth* v. *Burr* (L. R., 9 C. P. 213–214), and approved in the case of *Mersey Steel & Iron Co.* v. *Naylor*, pp. 439–440.

In *re Hodgson, Beckett* v. *Ramsdale*, 31 Ch. D. 177, the Court of Appeal has denied that there is any rule of English law 'that in the case of a conflict of evidence between living and dead persons there must be corroboration to establish a claim advanced by a living person against the estate of a dead person.' Counsels of prudence addressed by the Court to itself in its capacity of a judge of fact, as they might on other occasions be addressed to a jury, are too apt to harden into fixed rules of law, and it is well that this tendency should now and then be checked by an authoritative warning. The main point of the case is as to the separate liability of the estate of a deceased partner for a partnership debt: and it is decided that there is nothing in *Kendall* v. *Hamilton*, 4 App. Ca. 504, to prevent the creditor from proving against that estate first, and pursuing the concurrent remedy against a surviving partner (or his estate) afterwards, subject to two conditions: the surviving partner must be, or have been, before the Court, and the priority of the deceased partner's separate creditors must be secured. The working out of these principles may be, as indicated by Fry L. J., a nice and subtle operation. But it is for the Court of Appeal to command, and for chief clerks to execute.

How is one to 'spend a happy day at Rosherville?' Not by following the example of Mr. Wyatt. That gentleman, when taking his pleasure at the Gardens, wished to make the bear happy as well as himself. He determined to feed the bear, and went into an inner gallery near the bear's cage, and intended for the use of the keeper only. The too friendly animal thereupon not only ate the proferred bun, but pressed Mr. Wyatt's hand with so warm a pressure that the limb was permanently injured. The day was spoilt, but Mr. Wyatt had the consolation of suing the Company for negligence. He was far happier as a plaintiff than as a pleasure-seeker. Baron Huddleston held that if persons keep a wild animal they do so absolutely at their peril, and that the plaintiff's negligence had nothing to do with the liability of the defendants. The jury, to make matters safe, found that the plaintiff was not negligent, and further, though the plaintiff himself had fixed his damages at £200, gave him £500. The judge backed up the jury, amended the claim, gave judgment for £500, and refused a stay of execution. This was certainly a 'happy day in court.' The only question is whether the Court of Appeal may not spoil all. The learned Baron may be right in his law, though he seems to have laid down the rule as to an owner's liability for injuries done by wild animals in extremely wide terms, and we are not quite convinced that under the circumstances of the case the plaintiff's negligence (or rather, wanton exposure of himself to an obvious risk, for negligence is hardly an accurate term in such cases) might not, if it existed, be a material consideration. We certainly, if we were in his position, would rather have the £200 in our pocket than the chance of the £500 if the case is appealed against.

A presumption that everybody has notice of everything to be found in the British Museum Library would be a terrible addition to legal fictions. Mr. Justice Pearson has declined to inflict it on inventors: *Otto* v. *Steel*, 31 Ch. D. 241. The presumption that the Court is acquainted with all the reports and all the Statutes is already at least sufficient for the uses of life.

On Monday, March 1, after the conclusion of a course of lectures in the Inns of Court, on the law of possession and trespass, a Moot was held in the Hall of the Inner Temple on the following case:—*A* owes *Z* sixteen shillings. *Z* sends *M*, his servant, to get the money from *A*. *A*, not having change, delivers a sovereign to *M*, and *M* takes from his pocket and delivers to *A* coins which he believes to be four shilling pieces of *Z*'s money, and *A* takes the coins, believing them so to be. Five shilling pieces were in fact handed by *M* to *A*. Shortly afterwards *A* discovers that there are five shillings, and keeps them all, and applies them to his own use, and when questioned denies that he received more than four shillings. *A* could easily have returned one shilling to *Z* after discovering that he had received five. On these facts can *A* be properly found guilty of larceny?—After a well sustained argument the supposed conviction was affirmed, mainly on the authority of *Reg.* v. *Middleton*, L. R., 2 C. C. 38. The Minister of the United States honoured the Moot Court with his presence, and briefly expressed his concurrence with the result arrived at. The case is of course a variation on *Reg.* v. *Ashwell*, 16 Q. B. D. 190.

The defendant in *Reg.* v. *Ashwell* was without doubt a rogue, but was he proved to be a thief?

The following are some of the reasons for answering this question (*a*) with Mr. Justice Stephen in the negative; (*b*) with Mr. Justice Cave in the affirmative.

1. *a.* The feloniously 'taking and carrying away,' that is, the obtaining unlawful or fraudulent possession of goods against the will of the owner, is of the essence of larceny, but Ashwell's possession of the sovereign he is said to have stolen was obtained, though under a mistake, lawfully and without fraud.

b. It has never been decided that possession obtained by a pure mistake is lawful as between the parties: excusable it may be. In *Riley's* case the act by which possession was taken was unintentional and apparently innocent even of negligence. And how can you deduce lawful possession, without property, from an act of the owner, intended to pass absolute property?

2. *a.* None of the decided cases really go the full length of the decision in *Reg.* v. *Ashwell*. (See Stephen's Criminal Law, Art. 299.)

b. But *Riley's* case differs from it only in the mistake being one-sided.

3. *a.* If Ashwell was guilty of larceny, the enactment making theft by bailees larceny appears to be unnecessary.

4. *a.* If Ashwell was guilty of larceny, it is difficult to see why many criminals who have been convicted of obtaining goods under false pretences might not just as well have been indicted for larceny and found guilty.

5. *a.* Whoever looks at the decisions on larceny as a whole, will find that they can only be explained by the natural tendency of the Courts to extend a rough and unscientific definition of theft so as to cover acts which clearly deserve punishment but do not fairly come within the description of larceny. In this point of view *Reg.* v. *Ashwell* is merely the last of a series of judge-made enactments, and the defendant has been a victim to *ex post facto* legislation.

3, 4, 5. *b.* Legislation has constantly overlapped the common law by excess of caution. It is quite true that the common-law definition of larceny has been extended, and that even the simpler extensions were regarded with suspicion at first (see Hawkins, P. C., thereon). But it is too late to go back.

6. *a.* Persons who maintain that Ashwell was rightly convicted will be ultimately driven to maintain a point which was not quite clearly brought out in the course of the argument or even in the judgments, namely that Ashwell did not obtain 'possession' of the sovereign at all until the moment when he knew that the coin was a sovereign and not a shilling, and that as he at that moment dealt with it wrongfully the possession was from the beginning unlawful.

This contention may be correct, but it is opposed to the dictates of ordinary common sense and makes the criminality of an act depend upon superfine logical subtleties.

6. *b.* It is not necessary to hold with Cave J. that Ashwell did not get possession, but only detention (like the custody of a servant), by the mistaken handing over of the coin. A possible view is that he got (cf. *Riley's* case, Dears. 149) a possession in the nature of trespass, but excusable until discovery of the truth. Such was the old view of a 'pure finder's' position, as regards civil liability. When he did know the truth, and elected for conversion instead of restitution, he became a felonious trespasser instead of an excusable one.

Nine out of ten laymen who have read the case of the *Queen* v. *Ashwell* have remarked upon the absurdity of fourteen judges being equally divided upon the question whether a rogue had or had not committed a theft, and have commented upon the case with which persons of common-sense would decide matters which perplex judicial intellects. This line of comment is however itself, though natural, singularly absurd, and affords a good instance of the fallacies of common-sense. The difficulty of deciding this case and others like it arises neither from the absurdity of the law nor from the casuistry of lawyers, but from a very different thing—the subtlety of nature. The line between dishonest conduct and theft is often an extremely fine one, and yet if the Courts overlooked this distinction they would offend the soundest moral feelings of mankind. *X* is extravagant and incurs debts which he cannot pay and which any sensible man would know that he could not pay. *Y* buys goods with the full knowledge that *A*, the tradesman who sells them, thinks that *Y* is rich, whereas *Y* is over head and ears in debt, expects to become bankrupt next week, and has no intention of paying for the goods. *Z* buys goods from *A*, and obtains them on credit by falsely representing that *Z* is the Prince of Wales; he is a sharper, and means to sell, and does sell the goods the moment he gets hold of them. Now *X* it is clear is guilty of no crime, *Z* has been guilty of obtaining goods under false pretences, *Y*'s position may admit of doubt. The point to notice is that the line dividing dishonesty from crime is in these instances a very narrow one and yet must be drawn. The same remark emphatically applies to theft. *A* gives *X* a sovereign, meaning to give him a shilling; *X*, when he finds out the mistake, spends five shillings of the sovereign, or, as he would put it, borrows four shillings from *A*; *X* comes into *A*'s room, finds four shillings lying on the table, pockets and then spends them. In each case *X*'s conduct is dishonest, but it is idle to deny that the kind and degree of his dishonesty is in each case different. An acquaintance gifted with common-sense might find as much difficulty in determining *X*'s moral culpability as would a judge endowed with knowledge of law. Acquaintance with the laws of England is not absolutely inconsistent with the possession of common-sense.

The case of *Wheeler* v. *New Brunswick and Canada R. R. Co.*, 115 U. S. 29, shows a remarkable division of opinion in the Supreme Court of the United States on the application of the principle of estoppel to the interpretation of a contract. We may return to the point hereafter. Meanwhile, there is much to be said for the opinion of the strong minority of the Court.

The House of Lords has more than once found it necessary to check excess of zeal on the parts of Courts below in the application of its own recent decisions. Some years ago, in *Jackson's* case (otherwise the 'thumb case') 3 App. Ca. 193, it was explained that no such rule had been laid down as that whenever a railway company was charged with negligence, the whole matter must be left to the jury; though certain members of the Courts below had supposed this to be the effect of *Bridge's* case, L. R. 7 H. L. 213. The latest example of this process is *London and Brighton Railway Company* v. *Truman*, 11 App. Ca. 45. The Courts below had held the making and using of a cattle yard by the company for the purposes of their traffic to be authorized only on condition of not thereby creating a nuisance, and conceived that in so doing they were following the authority of the House of Lords in *Metropolitan Asylum District* v. *Hill*, 6 App. Ca. 193. But the House held, and unanimously, that the principle rightly applicable to powers granted in aid of the general powers and functions of a railway company was that of *Hammersmith Railway Company* v. *Brand*, L. R. 4 H. L. 171; in other words, that in this case the power was absolute in the sense of being free from any condition similar to that which was enforced in *Hill's* case. It would be a crude way of stating the result to say that the law favours railways and does not favour hospitals. Yet some such impression is likely to remain even with the professional reader.

Students of the law of contract will read with considerable interest the judgments of the Court of Appeal in *Johnstone* v. *Milling*, 16 Q. B. D. (C. A.) 460. This case sets a limit to the principle established or confirmed by *Hochster* v. *De La Tour* (2 E. & B. 678) and *Frost* v. *Knight* (L. R. 7 Ex. 111) that the repudiation by a promisor of his future liability under an agreement may be treated by the promisee as equivalent to a breach of contract. The Court of Appeal lay additional emphasis on the consideration that if the promisee is to treat renunciation as equivalent to a breach he must make his election; he must either treat the renunciation as a rescission of the contract or else regard it as a mere threat to break the contract, but he must not both treat it as a breach and for other purposes than bringing an action treat the contract as still in force. The Court further intimate a doubt whether the doctrine of *Hochster* v. *De La Tour* can be applicable to the case of a lease or other contract containing various stipulations where the whole contract cannot be treated as put an end to upon the wrongful repudiation of one of the stipulations of the contract by the promisor.

Both the decision of the Court and the suggestions contained in the judgments will commend themselves to lawyers. The doctrine of *Hochster* v. *De La Tour* is to a certain extent anomalous, and it was quite time for everyone to understand that this doctrine would not be extended.

One by one shall we lose all our most cherished legal legends? It has long been known to the learned that the story about Chief Justice Gascoign committing Prince Henry for a contempt of court rests on but a poor foundation, but the thorough worthlessness of the evidence had never we believe

been exposed until Mr. Solly Flood, late Attorney-General of Gibraltar, undertook a laborious investigation, the results of which have been published in a recent number of the Royal Historical Society's Transactions. We must not here follow his learned speculations as to the growth of the myth or ask whether some dark hints that Henry the Fifth, when not yet king, had kept too close company with Lollards, did not in course of time convert a sober young man of serious mind into the gay Prince Hal, whose companions are not the over godly, and in the end fix on to him a tale about a prince who struck a judge and was banished from his father's court, a tale originally and truly told of the prince who became Edward the Second. But, and this should be of interest to lawyers, Mr. Flood asserts that a summary committal for contempt in the time of Gascoign is an anachronism. After what seems to have been a diligent search, he writes thus,—'The Rotuli coram Rege are extant from a period by many years anterior to Magna Charta, the Controlment rolls from the commencement of the reign of Edward III, the year-books from the commencement of the reign of Edward II; and no instance whatever has yet been found in any of these rolls or in the year-books of any committal *in penam* by the Court of King's Bench in a summary manner and without indictment, presentment, information or arraignment for contempt committed even in its presence up to a considerable period after the death of Henry IV.' Here, at all events, is a very pretty challenge for any who have patience to read some miles of parchment.

A somewhat novel point arose *In re Richardson, Shilleto* v. *Hobson* (30 Ch. D. 396). In that case, an uncle who was an equitable mortgagee, by deposit of a title-deed handed the deed to his nephew saying, 'Now Billy my boy, thou comest of age this day, and I give thee this deed and the whole of the money I have paid to redeem it, and I hope thou wilt take care of it.' On the uncle's death, his executor claimed delivery up of the deed from the donee. It was admitted that the gift of the mortgage was invalid as an assignment of a chose in action for want of writing, but the donee claimed to hold the deed as in the nature of a pledge. The question was thus raised whether there is incident to every equitable mortgage by deposit a pawn of the deeds deposited. The Court of Appeal held that there was not, Fry, L. J. pointing out that so to hold would lead to the extraordinary conclusion that the mortgagee as pawnee might not only hold the deeds but, after reasonable notice, sell them. An equitable mortgagee holds the deeds not as pawnee, but merely as incident to his charge on the land. In the case under consideration, the executor having the beneficial interest in the charge, the donee of the deed was a trustee of the deed for him, and was ordered to deliver it up accordingly.

Stewart v. *The Merchants Marine Insurance Company* (53 L. T. N. 892) raised a point in the law of marine insurance which has never yet been decided in England. A time policy on a ship contained the following memorandum. 'The ship and freight shall be and are warranted free from average under £3 per cent. (unless general) or the ship be stranded, sunk, or burnt.' The ship went several voyages during the time covered by the policy, and on each voyage particular average losses were incurred each under £3 per cent., but amounting in the aggregate to more than £3 per cent. Were the shipowners entitled to add the losses together so as to take the case out of the warranty clause? In *Blackett* v. *The Royal Exchange Company* (2 C. & J. 244) the Court of Exchequer decided that in the case of a voyage policy

on a ship successive losses may under such a warranty clause be lumped together, and in the American case of *Brooks* v. *The Oriental Insurance Company* (9 Sumner 366), Story, J. expressed his concurrence in this view. In giving judgment in *Stewart* v. *Merchant Marine Insurance Company*, the Master of the Rolls pointed out that the same considerations do not apply to a voyage policy on a ship and a time policy. In the case of a voyage policy losses incurred in successive storms, or otherwise, can be readily ascertained at the end of the voyage, but not so losses incurred in successive voyages under a time policy: the assurer in the latter case would have to wait till the expiration of the period covered by the policy, and during this period the captain and crew of the ship might and probably would have changed more than once. At the time when the warranty clause was first introduced into policies of Marine Insurance, time policies were not limited as they now are to one year. The ascertainment of the losses might therefore have been almost indefinitely postponed. Such an intention was highly improbable. In the opinion of the Master of the Rolls the question how the losses should be borne was one for a jury of merchants. In the absence of such a jury the Court applying its knowledge of business to the construction of the policy decided that the losses ought not to be lumped together.

A curious point arose *In re Lucas, Parish* v. *Hudson* (55 L. J. Ch. 101) as to the effect of the Apportionment Act on a testamentary gift. A testator directed his executors to 'forgive my tenant *P* all rent or arrears of rent which may be due and owing from him to me at the time of my decease.' The rent was payable half yearly, at Michaelmas and Lady Day. The testator died in February. Was the tenant entitled to be forgiven his rent down to the date of the testator's death or only the rent due up to Michaelmas? The Master of the Rolls and Bowen, L. J. took the latter view. Fry, L. J. differed. He was of opinion that the Apportionment Act having altered the common law by providing that rent should be considered as 'accruing from day to day' the direction in the will included everything due and owing at the date of the testator's death, even though it was not then payable, there being nothing in the will to shew a contrary intention. The judgment of Jessel, M. R. in *Hasluck* v. *Pedley* (L. R. 19 Eq. 271) certainly seems to sanction this view.

It is greatly to be hoped that the honourable defeat of a plaintiff in person who was congratulated by the Court on his argument (*Emmens* v. *Pottle*, 16 Q. B. D. 354, 356), will not become a snare to other less capable plaintiffs, and a plague to the Court of Appeal. And this plaintiff was defeated: he sought to make the innocent vendors of a newspaper answerable for libellous matter contained in it, and the Court was naturally alarmed at the rule he invited them to lay down. 'The result would be that every common carrier who carries a newspaper which contains a libel would be liable for it, even if the paper were one of which every man in England would say that it was not likely to contain a libel:' in fact, every one aggrieved by anything published in the daily press would have his choice of suing the printer, the railway companies, or Messrs. W. H. Smith & Son. How far a mere vendor of printed matter is bound to ascertain what the book or newspaper is likely to contain is a question expressly left open by the Court.

The Queen v. *Webster*, 16 Q. B. D. 134 (C. C. R.), excites serious reflections. The Criminal Law Amendment Act, 1885, is an enactment which, from a

legal point of view, is open to very serious comment. A Statute which itself invades (though possibly for sufficient cause) several sound legal principles may become a very serious matter if under the influence of sentiment the Courts so construe its terms as to give the Act an extension not contemplated by Parliament. *The Queen* v. *Webster* suggests that this danger is a real one.

Rebecca Webster was convicted under the Criminal Law Amendment Act, 1885, sec. 6, of 'knowingly suffering' a girl under sixteen years of age to be 'in or upon premises' of which Webster was occupier, for the purpose in substance of having unlawful connection with a man whom the girl had picked up in the street. The girl was Webster's daughter; the premises were Webster's house, and the daughter's home. Of the moral offence committed by the prisoner it is hardly necessary to say anything; it was the vile act of a vile and abandoned woman. But whether the Act was violated is, to our minds, an open question. When a daughter comes back at night to her mother's home it is rather hard to assert that she is 'suffered to be upon the premises' for an immoral purpose. We certainly wonder at the ease with which two judges affirmed the conviction; everyone can sympathise with their lordships' feelings, but moral indignation is apt to be the parent of bad law, that is of injustice.

The vexed question whether the doctrine of election is applicable to the case of a married woman where the only property available to make compensation to the person disappointed by her election is property which she is restrained from anticipating has now been settled by the decision of the Court of Appeal *In re Vardon's Trusts* (31 Ch. D. 275). In *Willoughby* v. *Middleton* (2 J. & H. 344) Lord Hatherley, then Vice-Chancellor, decided that the doctrine was applicable. In *Smith* v. *Lucas* (18 Ch. D. 531) the late Master of the Rolls dissented from *Willoughby* v. *Middleton*, and pointed out that the consequence would be to render alienable that which was inalienable before. *Smith* v. *Lucas* was followed by Chitty, J., *In re Wheatley* (27 Ch. D. 606): *Willoughby* v. *Middleton* by Kay, J., *In re Vardon's Trusts* (28 Ch. D. 124). The Court of Appeal have adopted the view taken by the late Master of the Rolls and Chitty, J. The facts *In re Vardon's Trusts* were these. Under a marriage settlement the wife took a life interest for her separate use without power of anticipation, and covenanted to settle after acquired property. At the date of the settlement the wife was an infant. She afterwards became entitled during the coverture to a legacy, and refused to settle it. Could she be put to her election? The foundation of the doctrine of election is the presumption of a general intention in the authors of an instrument that effect should be given to every part of it; but this presumption may be displaced by a declaration of a particular intention inconsistent with it. The restraint on anticipation was, the Court of Appeal was of opinion, such a declaration of a particular intention, inconsistent with the doctrine of election, and therefore excluding it. 'A provision for a married woman' said Fry, L. J. 'who is restrained from anticipation, is regarded as giving the highest security known to the law that the married woman shall, come what may to herself and her husband, have from half-year to half-year some monies paid into her very hands to increase her comforts or supply her with maintenance. And this security would be seriously imperilled, if by the doctrine of election she could take in lieu of this inalienable provision a sum of money or other benefit which she might forthwith make over to her husband or squander at her choice.'

In *Standing* v. *Bowring* (31 Ch. D. 282) a lady of eighty-six transferred £6000 Consols into the joint names of herself and *B* her godson, but without *B*'s knowledge. The evidence shewed that the transfer was made with the intention of benefiting *B*. Afterwards the lady married and called upon *B* to re-transfer the Consols to her, which *B* refused to do on the ground that the resulting trust was rebutted, and the transfer constituted an irrevocable gift. In this refusal he was upheld by Pearson, J. In the Court of Appeal it was argued that the case was analogous to that class of cases in which a debtor has executed an assignment of his property to a trustee for the benefit of his creditors, but the assignment has not been communicated to the creditors, and the debtor has been held entitled to revoke the assignment as a mere mandate. The Court, however, held that the case of a gift completed though not communicated stands on a different footing. The National Debt Act, which regulates transfers of Consols, vests the legal title in the transferee, and does not make acceptance by him of the transfer necessary. Then is such an acceptance necessary on general principles of law? The cases of *Thompson* v. *Leach* (2 Vent. 198, 208) and *Siggers* v. *Evans* (5 E. & B. 367) shew that it is not, at least by English law. According to those authorities, a gift of property whether real or personal by deed vests the property in the donee without his assent; the acceptance of a benefit though not of a burthen (*Per* Cave, J., *Reg.* v. *Ashwell*) being presumed. The dissent of the donee may, however, divest the gift.

It is well-settled law that money paid under a mistake of law cannot be recovered back. There is, however, an exception to this rule, and that is when the money has been paid to an officer of the Court as a receiver or trustee in bankruptcy. 'In such a case the Court' as James, L. J. said *In re Condon, Ex parte James* (L. R., 9 Ch. 609) 'finding that its officer has in his hands money which in equity belongs to some one else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion, the Court ought to be as honest as other people.' In the recent case of *Re Rivett Carnac Ex parte Simmonds* (16 Q. B. D. 308) this principle has been recognised and slightly extended by the Court of Appeal. The money in that case paid under mistake had been paid to a trustee in bankruptcy, and had been distributed by him in dividends among the creditors. It appeared, however, that there was money coming to the hands of the trustee, and out of this the Court ordered the money, which by a mistake had gone to increase the estate, to be repaid.

In *Appleby* v. *Franklin* (34 W. R. 231) a father brought an action for damages for the loss of his daughter's services. The defendant, it was alleged, had seduced the plaintiff's daughter, and had also administered a noxious drug to her to procure abortion. The defence raised was that the statement of claim disclosed a felony, and that the right of action was suspended until the defendant had been prosecuted (*Wells* v. *Abrahams*, 7 Q. B. 554). Against this it was contended that the disability only applied where the plaintiff is the person whose duty it is to prosecute, and *Osborn* v. *Gillett* (L. R., 8 Ex. 88) was cited. In *Osborn* v. *Gillett*, the action was brought by a father against the defendant for having killed the plaintiff's daughter and servant by driving over her under circumstances that amounted to felony, and a demurrer that the plaintiff had not first prosecuted the defendant was overruled by the whole Court. This decision, the Court (Huddleston and Wills, J J.) held, governed the case before them, and the defence was therefore bad. Nevertheless we are of opinion

that the dissenting judgment of Bramwell B. in *Osborn* v. *Gillett* is good law, and the judgments of the majority are wrong.

In the January Number of this REVIEW we called attention to an unlucky expression in high quarters anent the rule in Shelley's case. The expression in question is now enshrined for the benefit of posterity in the February number of the Law Reports, where (however much we may regret its preservation) it will at all events do less harm than in the *Times*. But there is a fatality about the rule in Shelley's case. In the Chancery Division Reports for February, no less a personage than Lord Justice Fry is reported to have used the following language (p. 134):—'It is the policy of the law always to make estates alienable, and it is immaterial by what device it is attempted to prevent an owner from exercising the power of ownership. This lies at the foundation of the rule in Shelley's case, in which words appearing to convey an independent gift were construed to be words of limitation.' And in *Bowen* v. *Lewis*, two years ago, Lord Bramwell expressly called this rule a rule of construction, and Lord Cairns spoke of it as 'a rule of substance *in order to give effect to the intention*' (9 App. Ca. at pp. 907, 921). Now it is, or ought to be, common learning that the rule in Shelley's case is a rule of law, not of construction; i. e., it is wholly unaffected by any evidence of intention. Mr. Vaughan Hawkins has concisely and lucidly explained the distinction. But the difficulty of being always exact in these matters is apparent when we find in the most learned and accurate of recent works on the law of real property, we mean Mr. Challis's, the following sentence (p. 123): 'the law puts upon the limitation to the heirs a different construction, not giving to them any estate at all by purchase, but taking account of the mention of the heirs only for the purpose of giving a corresponding estate to the specified ancestor.' It is true that the verbal laxity is here corrected by the immediate context. Mr. Challis's book, by the way, has been grotesquely underrated by a Transatlantic reviewer who has evidently not read it, but proceeds on the *a priori* ground that no book of moderate size, or which does not cite all the cases, can be of serious value. What does this critic think, then, of Holmes on the Common Law and Langdell's Summary of the Law of Contracts?

In law, as in philosophy and literature, the Netherlands are exposed to powerful influences from France on one side and Germany on the other. But the countrymen of Erasmus and Grotius, of Huygens and Spinoza, and (to mention a few recent and living names) of Kuenen and Cobet, of Goudsmit and Polenaar, have ever maintained their spiritual as well as their political independence. The two legal reviews (*Themis* and *Rechtsgeleerd Magazijn*) with which we have now established relations contain ample proof, as regards that science which peculiarly concerns us here, that an active and individual school of jurisprudence is not likely to be found wanting in Holland in our time.

The *Athenæum* of March 6 publishes the indictment of Ben Jonson for the manslaughter of Gabriel Spencer 'cum quodam gladio de ferro et calibe [*sic*] vocat' a Rapiour precii iii s.' The roll, apparently mutilated, was only lately discovered by Mr. J. C. Jeaffreson in the Middlesex Sessions Rolls, now kept at Clerkenwell. It appears by the head-note of the Clerk of the Peace that Jonson pleaded guilty and had benefit of clergy. His biographers have hitherto assumed (besides other inaccuracies) that he was not brought to trial. There is not anything remarkable in the form of the indictment.

CONTENTS OF EXCHANGES.

(The titles of articles in foreign reviews are given in the original, translated, or abridged in English, without any fixed rule, as appears in each case most convenient for our readers.)

The English Historical Review. Edited by the Rev. M. CREIGHTON. No. 1. January, 1886. London: Longmans, Green and Co.

German Schools of History (Lord Acton)—Homer and the Early History of Greece (D. B. Monro, Provost of Oriel)—The Tyrants of Britain, Gaul, and Spain (E. A. Freeman)—The House of Bourbon (J. R. Seeley)—Notes on the Greville Memoirs—Notes and Documents—Book Reviews, Notes, Recent publications, etc.

The Journal of Jurisprudence and Scottish Law Magazine. Vol. 29, No. 348, for December, 1885. Vol. 30, Nos. 349–351, for January, February and March, 1886. Edinburgh: T. and T. Clark.

No. 348. Centralization and Decentralization—Technical Objections and Escapes from Justice, No. VIII—The Origin and History of the High Court of Justiciary—Notes in the Justiciary Court—Elegant Extracts from Brownlow—Notes of Cases.

No. 349. The Growth of Law—Technical Objections and Escapes from Justice, No. IX—Notes in the Inner House—A Day in the Polling-Booth—Parliament House Sketches, No. V—Reviews—Notes of Cases, etc.

No. 350. Can a Rational Form of Government result from a System of Absolutely Equal Votes?—Technical Objections and Escapes from Justice, No. X—The Origin and History of the High Court of Justiciary, No. XI—Notes in the Inner House—Parliament House Sketches, No. VI—Statutes affecting India—Review of the Volume of this Review for 1885—Notes of Cases, etc.

No. 351. The Growth of Law—Technical Objections and Escapes from Justice, No. XI—Three Generations of the Scots Bar—Notes in the Inner House—Reviews, Notes of Cases, etc.

The Scottish Law Review and Reports of Cases. Vol. 2, Nos. 13, 14, and 15, for January, February and March, 1886. Glasgow: William Hodge and Co.

No. 13. To our Readers—Notes on Cases decided in the Registration Appeal Court—Polling-Sheriffs and their Work—Current Notes, etc., Reports.

No. 14. A programme of Land-Law Reform (Agricultural Hypothec: Abolition of Primogeniture and Entail: Amendment of the Agricultural Holdings Act)—Some Subjects of Heckling—Current Notes, etc., Reports.

No. 15. The advances of a generation—Some Subjects of Heckling (Access to Moors and Mountains: Right to fish in Private Rivers)—Current Notes, Correspondence, etc., Reports.

Canada Law Journal. Vol. XXI, 1885. Vol. XXII, 1886. Toronto: C. Blackett Robinson.

No. 20, November 15. Reversioner and Remainderman—Citing Cases—Recent English Decisions—Selections, Reports, Notes.

No. 21, December 1. The Law of Dower—Recent English Decisions—Notes of Canadian Cases.

No. 22, December 31. County of York Judiciary—Late Mr. Justice Morrison—What is a Manufacturer?—Notes of Canadian Cases—Reports—Indices and Tables of Cases.

Nos. 1–2, January 1886. County of York Law Association—Land Law Reform in England—English Letter—The Married Women's Property Act of 1884—Notes of Canadian Cases.

No. 3, February 1. Liquor License Legislation—The New Rules—Law Society: Résumé of Proceedings—Notes of Canadian Cases—Reports of Recent English Practice Cases.

The Canadian Law Times. Vol. V, Nos. 12, 13 and 14, December, 1885; Vol. VI, Nos. 1 and 2, January and February, 1886. Toronto: Carswell & Co.

No. 12. Maritime Law: Necessaries and Repairs—Editorial Review—Review of Exchanges—Occasional Notes.

No. 13. Occasional Notes, consisting of Reports of Cases in the Supreme Court of Canada and in the High Court of Justice.

No. 14. This number contains the Indices to Vol. V.

Vol. VI. No. 1. The English Patent Law considered in connection with the Patent Act of 1883—Editorial Review—Book Review—Occasional Notes.

No. 2. The Husband's right to vote on his wife's Property—Book Reviews—Review of Exchanges—Occasional Notes.

The Manitoba Law Journal. Vol. II, Nos. 12 and 13, December, 1885. Winnipeg: R. T. Richardson.

No. 12. Recent American Decisions—Law Reports.

No. 13. Containing Index and Table of Cases to Vol. II.

*** We regret to have to announce that the *Manitoba Law Journal* is no longer published.

The Cape Law Journal. Vol. II, Part 6, December, 1885, Part 1, February, 1886. Grahamstown: for the Incorporated Law Society of the Cape of Good Hope, Richards, Slater & Co.

Part 6. A note on the extended Jurisdiction of Resident Magistrates—The Eastern Districts' Court—Prosecutions for Criminal Libel—The Theory of the Judicial Practice, I–II—Leading Cases in Cape Law—Reviews—Digest of Cases.

Part 1. The Theory of the Judicial Practice, III—Leading Cases in Cape Law—Reviews—Digest of Cases—My First bid for Fame—Rules of Court—Notes.

The Columbia Jurist. Vol. II, Nos. 13–19, 1885–1886. New York.

Year Books, II (T. W. Dwight), p. 146—Education in Law Schools in the city of New York (T. W. Dwight), p. 157—Studies in Red Tape, II, p. 170, III, p. 182 (W. S. Johnson)—Criminal Law in the Twelfth Century

(Melville M. Bigelow), p. 183—Suggestions for Legislative Reform (J. W. Hawes), p. 194—Letters Patent for Inventions (B. F. Lee), pp. 205, 218—Editorial and other Notes—Recent Cases—Moot Court Cases, etc.

The American Law Record. Vol. XIV, Nos. 5, 6, 7, and 8, for November and December, 1885, and January and February, 1886. Cincinnati: Bloch Publishing Company.

Nos. 5, 6, 7, 8. Reports in Supreme Courts, U.S., Ohio, and other States-Digest and Notes.

Revue de Droit International et de Législation Comparée. Vol. XVII, 1885—Brussels and Leipzic.

No. 6 (completing Vol. XVII). The Philosophical Principles of International Law: a criticism on the system of Professor Lorimer (G. Rolin-Jacquemyns)—Civilized and Barbarian Nations, third Article (J. Hornung)—The English draft Penal Codes of 1884 and 1885 (E. Lehr)—The Suez Canal and the Paris International Commission (Sir T. Twiss)—Reviews, Index.

Journal du Droit International Privé. 12me année. Nos. XI–XII. Paris: Marchal et Billard. 1885.

The Antwerp Congress: I. Maritime Law; II. Bills of Exchange (Ch. Lyon-Caen)—De la compétence des tribunaux allemands pour connaître des actions intentées contre les gouvernements et les souverains étrangers (L. von Bar)—The mode of celebration in France of a Marriage between a Frenchwoman and a Foreigner (E. Lehr)—Les navires armés par un gouvernement insurrectionnel ne doivent pas être considérés comme montés par des pirates—Du délai d'opposition aux jugements par défaut rendus en allemagne contre un défendeur résidant à l'étranger (Ch. Kauffmann)—Jurisprudence Internationale (under this heading is given the text of several commercial and other Treaties entered into by France during 1884–5).

Revue Internationale du Droit Maritime. 1re année. Nos. I–VIII. 1885–6. Paris.

Le fret sauvé d'un naufrage est-il dispensé de contribuer proportionnellement aux allocations ou dépenses de sauvetage? (A. de Courcy), p. 66—The Damage arising from Collisions at Sea in German Law (L. Beauchet), p. 183—The Comparative Law of General Average (L. de Valroger), pp. 266, 419—The Antwerp Congress: Resolutions on Maritime Affairs (F. C. Autran), p. 425—Documents Internationaux: Report of the Committee on General Average, p. 80—Hamburg Rules as to Affreightment (translated by P. Govare), p. 278, etc.—Reports and Notes of Cases in French and other Courts—Miscellaneous Notes, etc.

Bulletin de la Société de Législation Comparée. 17me année. Nos. 1, 2, and 3, for January, February and March, 1886. Paris.

No. 1. Proceedings of the Society—Les associations professionnelles en Angleterre, en France, en Autriche, en Allemagne, et en Hongrie (Hubert Valleroux)—Reports and Reviews.

No. 2. Proceedings of the Society—The Judicial System of the Argentine Republic (Daireaux)—La législation répressive du duel dans le projet de Code pénal du Japon (Boissonade)—Reports and Reviews.

No. 3. Montenegrin Laws (Jovanovic transl. by Babinet)—Extradition in Austria (Charegrin)—Reports and Reviews.

Zeitschrift für das Privat- und Öffentliches Recht der Gegenwart. Vol. XIII, Part II. Vienna: Alfred Hölder, 1886.

Das Rechtsgeschäft (J. Kohler)—Zur Analyse der Exscindirungsklage (E. v. Schrutka-Rechtenstamm)—Die Reform der Verwaltungsrechtsprechung und der Competenz-Conflicte in Italien (Karl Heimburger)—Zur Lehre vom Erwerbe der Erbschaft und des Vermächtnisses nach Römischem und Österreichischem Rechte—Reviews.

Archiv für Oeffentliches Recht. Vol. I, Parts 1 and 2. Freiburg i. B. 1885-1886. (Edited by Dr. Laband and Dr. Stoerk.)

No. 1. International repression of slave trade (v. Martitz)—German law of responsibility of officials to the public (Freund)—Questions of international law in the Franco-Chinese dispute (Geffcken)—Zur Lehre vom Budgetrecht (Laband)—Reviews, etc.

No. 2. Regulations as to change of residence in Prussia (Gneist)—Extradition of subjects for offences committed abroad (Hamaker)—Nationality and Extradition (from a forthcoming work) (Lammasch)—Official Responsibility, etc. (Freund), concluded—Reviews, etc.

Centralblatt für Rechtswissenschaft. Vol. V, Nos. 4 and 5, January and February, 1886. Stuttgart.

Critical Bibliography. General Reviews of French (Professor Lyon-Caen) and Spanish (Professor Oloriz) Legal Publications from 1880 to 1885.

Rassegna di Diritto Commerciale Italiano e Straniero. Vol. II, No. 12, November-December, 1885. Vol. III, No. 1, January-February, 1886. Turin.

Index-number to Vol. II—Digest—Mercantile Jurisdiction (F. M. Fiore-Goria)—Reports.

Archivio Giuridico. Vol. XXXV, Nos. 5-6. Pisa, 1885.

On the Draft Extradition Law (Olivi)—Italian Local Government (Crivellari)—A new Civil Code for Spain (Perez-Caballero)—La perenzione e gli effetti delle Sentenze (Perenzone)—Roman Law in Current Cases—Book notices and Index to completed Volume.

Il Filangieri: Rivista Giuridica Italiana di Scienza, Legislazione e Giurisprudenza. Anno XI, Part 2, Nos. 1-8, 7 January to 25 February, 1886. Naples.

These numbers consist wholly of Reports of Cases in the Courts of Cassation and Appeal at Rome, Naples, Genoa, Turin, etc.

Il Filangieri. No. 6, June, 1885 *.

Part 1. University Reform (Codacci-Pisanelli)—Foreign Corporations in Italian Law (Lomonaco)—Provocation as an Excuse for Homicide (Varriale)—Della liquidazione in linea amministrativa, etc. (Troise)—Contracts for Work and Services in Mercantile Law (Marghieri)—Book Reviews, etc.—Legislazione Comparata: England, Employers' Liability

* This number failed to reach us at the proper time. We take this occasion to beg that any failure or delay in postal communication with our correspondents which comes to their knowledge may be notified to the Editor as soon as possible.

Act, 1880; Switzerland, Laws on Responsibility of Railway and Steamboat Companies (1875), of Manufacturers (1881).

Part 2. Reports of Cases in Courts of Cassation of Rome, Florence, Turin, Naples.

Themis. Part 47, No. 1, January, 1886. The Hague.

Interpretation of Statutes (P. van Bemmelen)—Time Bargains and Wagering Contracts on Stock Exchange (M. Th. Goudsmit)—Reviews, Notices, etc.

Rechtsgeleerd Magazijn. Vol. V, Nos. 1 and 2, 1886. Haarlem.

No. 1. Use of German Authorities in Construction of Netherlands Penal Code (H. van der Hoeven)—On the Study of Dutch Legal History (an Introductory Lecture, by S. Gratama)—English Legislation since 1883 (W. L. P. A. Molengraaff)—Reviews, Notices, etc.

No. 2. Two questions in Criminal Law (D. Simons)—Compensation for property taken under compulsory powers (H. L. Drucker)—Mediæval Dutch law-texts (Prof. S. J. Fockema Andreae)—Reviews, Notes, etc.

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.